No. 75-3891

Supreme Court, U. S.
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In the
Supreme Court of the United States

October Term, 1975

JAMES STRONG, et al.,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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IN THE

SUPREME COURT OF THE UNITED STATES

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No.

JAMES STRONG, et al.,
Petitioners,
vs.
THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioners (Indian tribes which were parties to the treaty of Greeneville of August 3, 1975, 7 Stat. 49 and the treaty of Canandaigua of November 11, 1794, 7 Stat. 44, or their representatives) pray that a writ of certiorari issue to the United States Court of Claims to review the judgment of that Court entered in this case on June 25, 1975.

OPINIONS BELOW

The opinion of the Court of Claims, rendered on June 25, 1975 by a three-judge panel of that Court, on appeal from the Indian Claims Commission, is reprinted as Appendix A hereto. The decision is as yet unreported. The decision of the Indian Claims Commission, 31 Ind. Cl. Comm. 89, August 9, 1973, is printed as Appendix B, under separate cover.

JURISDICTION

The judgment of the Court of Claims was entered on June 25, 1975; no rehearing was sought; no extensions of time to petition for certiorari were sought.

Jurisdiction is invoked under § 20 of the Indian Claims Commission Act, 60 Stat. 1049, 27 U.S.C. § 70s(c) [Appendix, F, p. 137a, under separate cover], and 28 U.S.C. § 1255.

QUESTIONS PRESENTED

1. Are Indian tribes which used and occupied certain lands for about half a century, whose rights to the continued possession of such lands had been acknowledged, first by the King of England and later by the United States, and whose rights to compensation for yielding possession had been acknowledged by the United States, barred from recovering a conscionable consideration under the Indian Claims Commission Act because more than one tribe shared such use and occupancy in particular areas?

2. As to one substantial area claimed by two of the tribes, where an exception to the recognition of tribal titles to land was identified in a treaty, and in a subsequent treaty the Indians were induced to agree, without consideration, to define the exception so as to result, in effect, in a grant to the United States at least 10 times larger than the treaty identifying the exception provided, are the Indians barred from recovering a conscionable consideration because the relinquishment was by an erroneous definition rather than by an explicit cession?

TREATIES AND STATUTES INVOLVED

Pertinent provisions of the treaties of Greeneville of August 3, 1975, 7 Stat. 49, of Canandaigua of November 11, 1794, 7 Stat. 44, and of Fort Wayne of June 7, 1803, 7 Stat. 74 and of the Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. §§ 70 et seq. are set forth as appendices B, C, D, E and F under separate cover.

STATEMENT OF THE CASE

The petitioners are Indian tribes which for about half a century used and occupied lands ceded to the United States by the Six Nations under the Treaty of Canandaigua of 1794, 7 Stat. 44 and by the other tribes under the Greeneville Treaty of 1795, 7 Stat. 49, for which the Indian Claims Commission and the Court of Claims have held they are not entitled to compensation where the use was shared by more than one tribe.

(1) The Pre-Treaty History of the Lands

The ceded lands were part of the Old Northwest, the territory north and west of the Ohio River and east of the Mississippi. From 1763, when the French yielded their sovereignty to the English, to 1795, the Indians in possession insisted on their continued rights of possession, and except for a short hiatus following the American Revolution, both the English and American governments conceded such rights.

In 1763 the King of England issued a proclamation which "reserved and secured to the Indians" rights of "perpetual possession" while retaining in the Crown "the ultimate reversion in fee" (*Mitchell* v. *United States*, 9 Pet. 711, 756).

In 1768 the Fort Stanwix Treaty modified the boundaries of the reserved territory (Finding 11b, 31 Ind. Cl. Comm. 79, 170, Appendix B, p. 66a).

In 1776, at a treaty with three of the petitioner tribes, Commissioners representing the United States stated:

> You may rest assured that no white people will be suffered to pass the line settled at Fort Stanwix, for altho that agreement was made with the King yet as we are satisfied with it, we shall take care that it is complied with. [Docket 27-B Ex. 70, p. 10]

In 1778, under the first treaty published in the Statutes at Large, the United States engaged "to guarantee to the . . . nation of Delawares . . . all their territorial rights in the fullest and most ample manner, as it hath been bounded by former treaties . . ." (7 Stat. 13).* Chief Justice John Marshall referred to the quoted provision as one "entitled to peculiar attention, as it contains a disclaimer of designs which were, at that time, ascribed to the United States by their enemies, and from which Congress was then peculiarliy anxious to free the government." *Worcester* v. *Georgia*, 6 Pet. 515, 550.

During the Revolutionary War a majority of the tribes here concerned sided with the British, because, despite such disclaimers, they believed ("correctly", the Commission concluded, 31 Cl. Comm. at 101, App. B, p. 11a) that the Americans did have designs on their lands.

In 1783 the King conceded to the United States sovereignty over the Old Northwest (8 Stat. 80). In the earliest Indian treaties which followed, the United States commissioners asserted that the Indians, having been allied with the King, were dispossessed of their lands, to which the United States now claimed title by conquest (Finding 13b, 31 Ind. Cl. Comm. 177, App. B, p. 72a). These early

treaties provided for the surrender by the tribes of more than half of Ohio, and for the allocation of described areas to certain tribes. (7 Stat. 15, 16, 26. The treaty journals are in the record.)

The Indians "resented the treaties they had been forced to execute, and they continued to regard all the territory west of the Ohio River as theirs" (Finding 13c, 31 Ind. Cl. Comm. 179, App. B, pp. 73a-74a). After a few years of fruitless negotiations and inconclusive hostilities, the United States explicitly repudiated the doctrine of conquest, and explicitly conceded that the King had conveyed to the Republic only what he claimed, which was the right of preemption. The United States commissioners stated to the Indians, in 1793:

> Brothers: . . . We, by the express authority of the President of the United States, acknowledge the property, or right of soil, of the great country, above described [the Old Northwest], to be in the Indian nations, so long as they desire to occupy the same. We only claim particular tracts in it . . . and . . . the right of purchasing of the Indian nations disposed to sell their lands, to the exclusion of all other white people whatever. [Docket 27-B, Ex. 95, pp. 13-14]

At the same time the commissioners asked that the Indians make the concession of relinquishing "some of the lands on your side of the river Ohio" (ibid., p. 12). This was the compromise effected by the Greeneville Treaty.

For that treaty, General Anthony Wayne, who acted for the United States, was provided with the speech of the 1793 commissioners, quoted in part above, and instructed to make the same kind of compromise. He was advised that the original construction of the treaty of peace with Britain,

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* As disclosed by the evidence, the "former treaties" included the one held in 1776, cited above, and two held in 1775 and 1777. No written agreements were concluded at these treaties, which the Commission and the Court of Claims disparage as merely "meetings" (31 Ind. Cl. Comm. 172-3, App. B, pp. 67a-68a; C. Cls., App. A, p. 10).

> a construction as unfounded in itself as it was unintelligible and mysterious to the Indians . . . cannot be too explicitly renounced. At the same time you will carefully explain and maintain the preemption right of the United States. Some delicacy will be required to state even this claim, without exciting their displeasure. If the land is theirs (and this we acknowledge) they will say "Why shall we not sell it to whom we please?" [Docket 27-B Ex. 101, p. 4]

None of the acknowledgments of the Indians' rights to their lands was conditioned on exclusive tribal possession. The possibility of shared use and occupancy was expressly accepted in Wayne's instructions:

> The treaties heretofore made with the Western Indians, have comprized a number of nations; and if there be any truth in their pretensions of late years, their interests are blended together. [ibid., p. 3]

By the Greeneville Treaty the tribes relinquished to the United States a large area in Ohio and Indiana, and smaller areas to the north and west. The United States relinquished all the unceded lands of the Old Northwest to the "tribes who have a right to those lands" and guaranteed them the quiet enjoyment of the lands "against all citizens of the United States, and against all other white persons who intrude upon the same" (7 Stat. 49, 51-52; App. C, p. 114a).

(2) The Claims of All the Petitioners

The petitioners brought suit under the Indian Claims Commission Act alleging, in substance, that the consideration paid to them for lands of which they lost the use (less than a penny an acre) was unconscionable. At the time, the minimum selling price of the public lands, after extinguishment of Indian claims, was $2.00 an acre.

As found by the Commission, whose findings were sustained by the Court of Claims, in virtually all the geographic divisions of the ceded lands, different combinations comprising two or more of the tribes represented by petitioners (Chippewa, Delaware, Miami, Ottawa, Piankeshaw, Six Nations (Mingo), Shawnee, Wea and Wyandot) were occupying villages together and sharing hunting territories. Until the Revolutionary War, which disrupted tribal life in Ohio and Indiana, "the patterns of use and occupancy . . . had remained fairly consistent since the 1740's" (Finding 12b, 31 Ind. Cl. Comm. 89, 174, App. B, p. 69a).*

The Commission held and the Court of Claims affirmed, that "aboriginal title" and the right to compensation are limited to the two land segments utilized by each of two tribes (Delaware and Shawnee) exclusively, while in the lands shared by two or more tribes there was no "aboriginal title" by reason of such sharing, and no compensation need be paid for the cession of such lands to the United States. It held further that none of the prior treaties or representations of the United States constituted a "recognition" of the Indian title such as would overcome the imposed handicap of non-exclusive possession.

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* The statement in the Court's opinion (App. A, p. 5) that, "The area as a whole 'was inhabited, controlled or wandered over by many tribes or groups'" is not a quotation from the Commission's findings but from another decision of the Court, involving different tribes and a different area. As applied to this case, it is ambiguous. The Commission's findings show that different portions of Royce Area 11, the "area as a whole" referred to by the Court of Claims, was inhabited and controlled in two cases by one tribe and in the remainder by different combinations of two or more tribes. There was no "wandering" and no single tribe was spread throughout the area as a whole.

(3) The Separate Claims of Two Petitioners

For one area, the Vincennes Tract, the decision, while adhering to its main premises, was based primarily upon another ground. The Greeneville Treaty excepted from the lands guaranteed to the Indians "the post of St. Vincennes on the river Wabash, and the lands adjacent, of which the Indian title has been extinguished" (7 Stat. 49, 51, App. C, p. 113a). The title had been extinguished (supposedly in 1742) by a grant to the French of which the boundaries were uncertain. In 1803 a treaty was held to fix the boundaries of the lands so excepted. An agreement was concluded which described a tract of approximately 1,800,000 acres, despite an Indian protest at its extent, a protest which William Henry Harrison, the United States treaty commissioner, found to be valid after investigation (7 Stat. 74; App. E, p. 128a; Finding 32, 31 Ind. Cl. Comm. at 209-210, App. B, p. 98a). In subsequent administrative proceedings, the Government confirmed titles acquired under the earlier grant to the extent of not more than 180,000 acres, the remainder becoming public lands of the United States. The 1803 treaty provided no consideration to the Indians.

The Piankeshaw Tribe, grantor to the French and original undisputed occupant of the area, and the Delaware Tribe, an occupant by leave of the Piankeshaw, claimed compensation for the approximately 1,620,000 acres lost to them and acquired by the United States without consideration by reason of the erroneous boundary description. In dismissing the claim, the Commission stated, ". . . although . . the Indians did at first protest . . the Indians did ultimately agree . . the Indians received no additional consideration . . . other than a reaffirmance of the relinquishment by the United States . . . of claims to surrounding areas." (31 Ind. Cl. Comm. at 209-210, App. B, p. 98a). The Court of Claims affirmed (App. A, pp. 14-16).

REASONS FOR GRANTING THE WRIT

1. The Importance of the Questions

First to be resolved is the question whether the right to compensation for the loss of lands on and by which Indians lived is recognized only when a single monolithic tribe possessed land exclusively as against all others, or whether the right may justly be asserted when two or more tribes, in stable occupancy, together possessed land to the exclusion of all others. The holding of the Court of Claims is that, absent special recognition by Congress, no rights are possessed by Indians where there is common use—the occupancy of a second tribe destroys the rights of the first tribe, not in favor of the second tribe but in favor of the United States.

Second, even if the Court's decision has some validity as an abstract principle, which petitioners dispute, the question remains whether the commitments of the United States, legal or moral, in the period when it was solidifying its independence, the commitments on the basis of which it made peace with the Indians and obtained their lands, may be brushed aside as though never made, now that the Indian Claims Commission Act has provided a forum in which such commitments may be made good.

With respect to the Vincennes Tract, the gist of the decision below is the statement of the Court (App. A, pp. 15-16) that, "The 1803 Treaty was intended to define the scope of the earlier cession, not to change it. Under these circumstances, we do not find the absence of additional consideration a factor which entitles appellants to recover." The Indians are not entitled to recover because some 1.6 million acres were "defined" out of their possession, rather than ceded by them. This decision elevates an incorrect formalistic distinction into a principle which implies that the mandate of Congress to do justice to the

Indians as expressed in the Indian Claims Commission Act may be ignored when an unjust transaction is cast in terms of an appropriate verbal formula.*

These are issues of special significance in this Bicentennial Year. They have been disposed of too cavalierly by the Court below. Its decision reinstates the false doctrine that the Indian lands passed by conquest from the King of England to the new republic, a doctrine renounced two centuries ago (so the Indians believed) in the instructions given to Anthony Wayne for the treaty by which the Indians ceded their lands:

> As this construction . . . as unfounded in itself as it was unintelligible and mysterious to the Indians . . . has probably been the main spring of the distressing war on the frontier, it cannot be too explicitly renounced. [Docket 27-B Ex. 101, p. 4]

It has sometimes been said that as the United States won its independence, the Indians lost theirs. The Indian Claims Commission Act was designed to render justice at least in those cases in which damages are measurable.**

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* Congress explicitly provided in the Indian Claims Commission Act (§ 2, Clause (4), 25 U.S.C., § 70a App. F, p. 132a) that the Commission shall hear "claims arising from the taking by the United States, whether as the result of a treaty of cession *or otherwise,* of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant", a provision which would appear directly contrary to the Court's holding. [Emphasis added.]

** That Congress intended justice be done to the Indians is evidenced, *inter alia,* by Clause (5) of § 2 of the Indian Claims Commission Act (25 U.S.C. § 70a, App. F, p. 133a), which provides, in addition to the traditional legal and equitable grounds enumerated, that the Commission was to entertain "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity."

The question whether justice has been rendered on these claims (the word is missing and the concept is not apparent in the opinions of the Indian Claims Commission and the Court of Claims) deserves the consideration of this Court.

2. The Confused State of the Law

The decision below expresses the Court's reluctance to "redefine a concept [of aboriginal Indian title] which has stood the test of many decisions" (App. A., p. 6). If the Court's concept were indeed consistent with the precedents, petitioners would argue that it is time a just rule replaced an unjust precedent. But petitioners believe that what is needed is not so much change as light. The Court below, by enlarging some and contracting some of its own past dicta, has arrived at a result which, if allowed to stand, would leave the legal concept of aboriginal title in a state of confusion.

While some decisions cited in the opinion below routinely defined Indian title by reference to exclusive possession, not one of these decisions concerned a situation, such as here, of two or more tribes occupying permanent-type villages together, and utilizing hunting territories cooperatively rather than competitively. Moreover, the Court has consistently expressed the view that compensable Indian title may be based upon joint and amicable possession of land by two or more tribes. *Choctaws, et al.* v. *United States,* 34 C. Cls. 17, 51; *Sac and Fox Tribe* v. *United States,* 161 C. Cls. 189, 202; *United States* v. *Kickapoo Tribe,* 174 C. Cls. 550; *Confederated Tribes of the Warm Springs Reservation* v. *United States,* 177 C. Cls. 184, 194. Nevertheless, in this, the first case based upon actual joint and amicable possession*, the Court shifts its ground and re-interprets "joint and amicable" to imply political merger. The decision cited as precedent for this interpretation, *Sac and Fox Tribe* v. *United States,* 179 C. Cls. 8 (App. A, pp. 6-7) has nothing whatsoever to do with "joint and amicable possession". As the quotation from that decision demonstrates, it was a case of "a single nation" formed by the "merger" of what had earlier been two ethnically distinct tribes. The opinion in that case discloses that exclusiveness of possession was not even in issue. Thus the Court below, while asserting strict adherence to precedents, has actually, although without saying so, parted company with its own past decisions.

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* Joint occupancy of villages is the clearest evidence of joint and amicable possession.

The decision below is also inconsistent with leading decisions of this Court.

In *United States* v. *Santa Fe R. Co.,* 314 U.S. 339, the leading case cited for the exclusiveness doctrine, a distinction was drawn between lands held by exclusive use and occupancy and "lands wandered over by many tribes" (at p. 345). The Court of Claims has read that decision as if it held that one tribe may have title, but more than one is legally equivalent to "many" and "wandering" and therefore landless. But *Santa Fe,* contrasting two extremes in Indian life styles, does not support the all-or-nothing doctrine applied by the Court below.

The Court below has adopted one rule for lands ceded at Greeneville (no compensability for lands held by two tribes) and another rule for the lands reserved at Greeneville (compensability for lands held by any number of tribes: *Miami Tribe* v. *United States,* 146 C. Cls. 421, 431; *United States* v. *Kickapoo Tribe,* 174 C. Cls. 550; *James Strong et al.* v. *United States,* decided May 30, 1975.*)

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* This decision, captioned like the instant case, involves some of the same parties.

The distinction drawn is that title to the reserved lands was "recognized" whereas title to the ceded lands was "aboriginal". So far as Greeneville is concerned, such a distinction is historically absurd, and implies a dichotomy not visible in the record of what occurred. So far as the law is concerned, as laid down by this Court, the distinction applies to cases relying upon the Fifth Amendment to the Constitution, but not to suits for fair compensation brought, like this one, under a general jurisdictional act. *United States* v. *Alcea Band of Tillamooks,* 329 U.S. 40, 51; cf. *Tee-Hit-Ton Indians* v. *United States,* 348 U.S. 272.

The decision below is likewise inconsistent with the principle that "Indian possession or occupation was considered with respect to their habits and modes of life . . ." *Mitchell* v. *United States,* 9 Pet. 711, 745.

CONCLUSION

For the foregoing reasons, the writ of certiorari to the United States Court of Claims should be granted.

Respectfully submitted,

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APPENDIX A

DECISION OF THE UNITED STATES COURT OF CLAIMS

Appeal No. 1-74 Decided June 25, 1975

In the United States Court of Claims

Appeal No. 1–74

Ind. Cl. Comm. Docket Nos. 13–G, 15–E, 27–B, 29–C, 64, 89,
120, 130, 18–M, 40–F, 252, 335 and 338

31 Ind. Cl. Comm. 89

(Decided June 25, 1975)

JAMES STRONG, ET AL., APPELLANTS-CROSS APPELLEES v. THE UNITED STATES OF AMERICA, APPELLEE-CROSS APPELLANT

James R. Fitzharris, attorney of record, for James Strong, et al., as the representatives and on behalf of all members by blood of the Chippewa Tribe of Indians; for Robert Dominic, et al., on behalf of the Ottawa Tribe of Indians; for the Shawnee Tribe of Indians of Oklahoma, et al., appellants, cross-appellees.

Robert C. Bell, Jr., attorney of record, for Hannahville Indian Community, et al., appellants, cross-appellees.

Rodney J. Edwards, attorney of record, for Red Lake Band, et al.; for Lawrence Zane, et al., ex rel. Wyandot Tribe, et al., appellants, cross-appellees.

Robert S. Johnson, attorney of record, for the Potawatomie Tribe of Indians, the Prairie Band of the Potawatomie Tribe of Indians, et al., appellants; cross-appellees.

David L. Kiley, attorney of record, for Ira Sylvester Godfroy, et al., ex rel. the Miami Indian Tribe, appellants; cross-appellees.

Paul G. Reilly, attorney of record, for the Six Nations, appellants, cross-appellees.

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Louis L. Rochmes, attorney of record, for the Delaware Tribe of Indians; for the Absentee Delaware Tribe of Oklahoma; for the Citizen Band of Potawatomi Indians of Oklahoma, appellants; cross-appellees.

Edwin A. Rothschild, attorney of record, for the Miami Tribe of Oklahoma, appellants, cross-appellees.

Jack Joseph, attorney of record, for the Eastern Shawnee Tribe of Oklahoma, et al., for the Peoria Tribe of Indians of Oklahoma, et al., appellants, cross-appellees.

Allan Hull, attorney of record, for the Kickapoo Tribe of Oklahoma, the Kickapoo Tribe of Kansas, et al., and the Ottawa Tribe of Oklahoma, et al., appellants, cross-appellees.

Robert E. Fraley, with whom was Assistant Attorney General *Wallace H. Johnson*, for the United States, appellee, cross-appellant.

Before COWEN, *Chief Judge*, KUNZIG, and BENNETT, *Judges*.

ON APPEALS FROM THE INDIAN CLAIMS COMMISSION

COWEN, *Chief Judge*, delivered the opinion of the court:

This case is before the court on numerous appeals, as well as the Government's cross-appeal, from various portions of an interlocutory decision of the Indian Claims Commission dated August 9, 1973. The consolidated proceedings below involved the determination by the Commission of title claims by various tribal claimants to an area of land identified on Royce's Map of Ohio as Area 11 (hereinafter called Royce Area 11), as well as claims of title by several appellants to certain smaller areas and rights of passage located north and west of Royce Area 11. The land with which this appeal is concerned was relinquished to defendant by the various tribes who signed the Treaty of Greeneville of August 3, 1795 (7 Stat. 49),[1] and by the Six Nations[2] who signed the treaties

of October 22, 1784 (7 Stat. 15), at Fort Stanwix; of January 9, 1789 (7 Stat. 33), at Fort Harmar; and of November 11, 1794 (7 Stat. 44) at Canandaigua.

In summary, the Commission found that, except for two relatively small segments of land held "aboriginally" by the Delaware and Shawnee Tribes respectively, Royce Area 11 was not held by the ancestors of the present Indian claimants in such a manner as to require defendant to compensate them under the Indian Claims Commission Act, 60 Stat. 1049. Furthermore, the Commission determined that the appellants had no compensable interest in most of the smaller areas lying north and west of Royce Area 11. For the reasons discussed below, we hold that, with one exception, the Commission's findings of fact are based on substantial evidence in the record and that its conclusions of law are correct.

I

By far the largest area covered by the Commission's decision was Royce Area 11, consisting of approximately 18,000,000 acres and covering two-thirds of what is today the State of Ohio and a small contiguous area in Indiana.[3] It is, therefore, not surprising that the most vigorous and lengthy contentions of the parties deal with this territory.[4] Simply stated, the tribal appellants seek affirmance of the Commission's determinations that the Delaware and Shawnee Tribes had aboriginal title to certain portions of Royce Area 11, and reversal of the Commission's decision that in the remainder of Royce Area 11, there was no Indian title. On the other hand, the Government contends that no tribe is entitled to recover additional compensation for any portion of Royce Area 11, since none had aboriginal or recognized title. Defendant further argues that, if any title did exist at any point in time, it was extinguished. Thus, the Government seeks affirmance of the Commission's decision against claimants and a reversal of the decisions favorable to the Delaware and Shawnee in Royce Area 11, and to the Wyandot in Royce Area 20 and the unsurveyed area near Sandusky, Ohio.

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[1] The following tribes were signatories of the Treaty of Greeneville: Wyandots, Delawares, Shawnees, Ottawas, Chippewas, Potawatomis, Miamis, Eel-Rivers, Weas, Kickapoos, Piankeshaws, and Kaskaskias. The treaty, by its terms, superseded various earlier agreements made with certain of the above tribes.

[2] The Six Nations was a confederacy consisting of the Seneca, Cayuga, Oneida, Onondaga, Mohawk, and Tuscarora Nations. In these treaties the Six Nations relinquished its claims of title to the areas west of New York, which included Royce Area 11.

[3] Article III of the Treaty of Greeneville drew a general boundary line between land agreed to be owned by the United States and lands agreed to be owned by the Indian signatories of the treaty. This line, called the Greeneville Treaty Line, began at the mouth of the Cuyahoga River on Lake Erie at a point where Cleveland is now located. From this point, the Line ran south approximately 70 miles to Fort Lawrence, Ohio, then to the Indian border at Fort Recovery. The Line then proceeded southwest to a point on the Ohio River approximately 25 miles east of the Ohio State border. All lands south and east of this line, which were ceded and relinquished to the United States, were identified as Royce Area 11.

[4] We need not decide some of the issues presented by various appellants because these issues become important only if we uphold their claim of aboriginal title, which we do not.

The Commission's opinion and accompanying findings of fact trace in detail the history of Indian settlements in this area from 1650 through 1795, emphasizing the evolving relationships among the various tribes and between the several tribal groups and the French, the British, and the Americans. The findings demonstrate considerable thoroughness and attention to detail, and for the most part they are not questioned by the Indian appellants. As stated in the Opening Brief of Certain Appellants: "The issues in these appeals [as to Royce Area 11] involve primarily questions of principle, not of fact."

Aboriginal title. The primary "question of principle" presented in the Indian claimants' appeals concerns the Commission's concept of "aboriginal title." Throughout its discussion of this issue, the Commission relied on past case law in determining whether claimants sufficiently proved the existence of aboriginal title at the cession date in 1795. The doctrine of aboriginal title is not new. As the court stated in *Sac & Fox Tribe* v. *United States*, 179 Ct. Cl. 8, 20–21, 383 F. 2d 991, 997, *cert. denied*, 389 U.S. 900 (1967):

> [T]he right of sovereignty over discovered land was always subject to the right of use and occupancy and enjoyment of the land by Indians. This right of use and occupancy by Indians came to be known as "Indian title." It is sometimes called "original title" or "aboriginal title."

Similarly, the requirements for an Indian claimant to prove aboriginal title have been listed on numerous occasions in the past. For example, we held in *Sac & Fox Tribe* v. *United States*, 161 Ct. Cl. 189, 201–02, 315 F. 2d 896, 903, *cert. denied*, 375 U.S. 921 (1963), that

> [t]o be accepted under the Indian Claims Commission Act, aboriginal title must rest on *actual, exclusive and continuous use and occupancy "for a long time" prior to the loss of the property.* [Emphasis supplied.]

See United States v. *Santa Fe R.R.*, 314 U.S. 339 (1941); *Confederated Tribes of Warm Springs Reservation* v. *United States*, 177 Ct. Cl. 184, 194 (1966), and cases cited therein. It was with this standard that the Commission approached its task in this case.

The obstacle facing the Indian claimants in this litigation is the requirement of "exclusiveness." Generally, mixed and non-exclusive use and occupancy of an area precludes the establishment of any aboriginal title by any of the users of the subject property. *Quapaw Tribe* v. *United States*, 128 Ct. Cl. 45, 120 F. Supp. 283 (1954). The purpose of this requirement is fairly obvious. In order to award compensation to the Indians for the value of land ceded to or taken by the Government, it is essential that the Commission first determine that the land in question was truly "owned" by the ancestors of the particular claimant or claimants. Certainly, one of the primary characteristics of ownership is the desire and ability to exclude others from the area over which ownership is claimed. Confronted with a similar issue recently, the court stated in *United States* v. *Pueblo of San Ildefonso*, —— Ct. Cl. —— (April 1975):

> Implicit in the concept of ownership of property is the right to exclude others. Generally speaking, a true owner of land exercises full dominion and control over it; a true owner possesses the right to expel intruders. In order for an Indian tribe to establish ownership of land by so-called Indian title, it must show that it used and occupied the land to the exclusion of other Indian groups. True ownership of land by a tribe is called in question where the historical record of the region indicates that it was inhabited, controlled or wandered over by many tribes or groups. [slip op. at 17]

"Exclusiveness" becomes a problem to plaintiffs simply because the historical record of Royce Area 11 demonstrates clearly that, with the exceptions found by the Commission, the area as a whole was "inhabited, controlled or wandered over by many tribes or groups." Indeed, claimants' own expert witnesses testified that prior to 1795 there was no exclusive use and occupancy ascertainable in the overall Royce Area 11 or in any large portion of it. Thus, without more, it would seem that the appeals grounded on claims of aboriginal title must be denied. Faced with the problem, the appellants have urged us to redefine the aboriginal title concept to fit their particular situations. According to the claimants:

> 'Aboriginal title' as of 1795, if it means anything, must refer either to the customs and practices of the Indians in the ceded area, at the relevant times, or to the 1795 law of the sovereign United States. The sharing of lands by tribes who had not otherwise combined in the ceded area to form a new entity, conformed to both.

This attempt to have us redefine a concept which has stood the test of many decisions in the past is not persuasive. We are not disposed to discard a principle which has, in numerous cases, been held to meet the purposes and objectives of the Indian Claims Commission Act.

However, a denial of claimants' attempt at redefining the "aboriginal title" theory does not automatically result in the defeat of their aboriginal title claim. Although normally no tribe will be deemed to have proven aboriginal title when others used and occupied the land in question, there is a "built-in exception" to the "exclusivity" requirement. Actually, this "exception" merely creates a method of analysis of "exclusivity" in certain rare situations. In the past, the court has held on several occasions that two or more tribes or groups might inhabit an area in "joint and amicable" possession without erasing the "exclusive" nature of their use and occupancy. *See United States* v. *Pueblo of San Ildefonso*, *supra; Turtle Mt. Band of Chippewa Indians* v. *United States*, 203 Ct. Cl. 426, 490 F. 2d 935 (1974); *Sac & Fox Tribe* v. *United States*, 179 Ct. Cl. 8, 383 F. 2d 991, *cert. denied*, 389 U.S. 900 (1967). To qualify for treatment under "joint and amicable" occupancy, the relationship of the Indian groups must be extremely close. We described just such a relationship in *Sac & Fox Tribe* v. *United States*, *Id.* at 16, 383 F. 2d at 995, as follows:

> Originally the Sac and Fox Nation consisted of two separate and identifiable tribes of Indians belonging to the Algonquin stock. Around 1735, due to their mutual hostility and conflict with the French, they formed a close and intimate alliance, politically and socially, *so that from thence forward they have been dealt with and referred to as a single nation both in their relationship with other Indian tribes and in treaty negotiations and other matters with the United States.* (Emphasis supplied)

Indeed, the tribal relationship between the Sac and the Fox was deemed by the court to be so close as to constitute a "merger" of the previously existing tribal entities.

The Commission was correct in finding that no such relationship existed among the tribal claimants in the case presently before the court. The attempts by appellants to prove the existence of a "confederacy" of various tribal entities living at times in Royce Area 11 are simply not persuasive, when one reviews the evidence presented to the Commission. The cooperation upon which claimants rely can be explained readily without reference to any "confederacy" theory. In this regard it should be remembered that Royce Area 11 was, during the relevant time period, "an immense open territory which was sufficiently large to accommodate all those Indians who settled or hunted there." 31 Ind. Cl. Comm. at 111. Thus, one reason for cooperation among the tribal claimants was the lack of any need for inter-tribal warfare over the property rights of the various tribes. The area was simply too large and untamed for such activity to be necessary. Furthermore, the cooperation which did exist resulted from the existence of a common enemy, the "white man," who, according to the evidence, battled the tribes continuously. Finally, there is little evidence in the record to support a theory that the Indians considered themselves as "one nation." The 1750 inter-tribal council, relied on so heavily by the claimants, was not such a recognition; instead, it was an attempt to reduce the likelihood of armed conflict between various tribes interested in their own tribal interests. The United States did not view the tribal residents of Royce Area 11 as a confederacy. For example, the Commission, in looking at those lands on the Indian side of the Greeneville Treaty Line, found:

> * * * it was understood by the Government's representatives and the Indians [at Greeneville] that each tribe had separate lands, that there was no community of interest in the lands of the Northwest territory.

5 Ind. Cl. Comm. 180, 214 (1957). For these reasons, we reach the same conclusion that we reached in *Iowa Tribe* v.

United States, 195 Ct. Cl. 365, 370 (1971), *cert. denied*, 404 U.S. 1017 (1972), where we held:

> The [tribes] did not consider themselves, and were not treated, as a single or closely integrated entity, but rather as separate political groups which were friends or allies (for the most part). Their use of the same lands may have been in common, like much of Indian use of the midwestern and western regions—but the Commission could properly decide that it was not proved to be truly joint, and therefore that each separate tribe's claim to Indian title would have to be tested on its own distinct basis.

Taking each tribe's right to title individually and utilizing the applicable precedents discussed above, it becomes obvious that the Commission's denial of aboriginal title for a large portion of Royce Area 11 was correct.

Recognized title. Several of the claimants in this case also argue that, even if aboriginal title is not found for Royce Area 11, their ancestors had "recognized title" to this land. According to their contentions, Indian title to this land was recognized by the Government (1) by its assumption of the rights and obligations of the British Crown under the Fort Stanwix Treaty of 1768; (2) by its own treaties of 1775, 1776, and 1778, and (3) by its acknowledgments of Indian title during the post-Revolutionary War era. We recognize at the outset that "we are free to reach our own independent conclusion on this question since the interpretation of a treaty is a question of law and not a matter of fact." *Citizen Band of Potawatomi Indians* v. *United States*, 179 Ct. Cl. 473, 482, 391 F. 2d 614, 618 (1967), *cert. denied*, 389 U.S. 1046 (1968); *see Minnesota Chippewa Tribe* v. *United States*, 161 Ct. Cl. 258, 262, 315 F. 2d 906, 908 (1963). After making that independent determination, we have concluded that the Commission's denial of recognized title in this case was correct.[5]

The doctrine of recognized title, like that of aboriginal title, is not novel, and there can today be little room for misunderstanding precisely what proof must be presented by claimants seeking to benefit from it. These standards were clearly summarized in *Miami Tribe* v. *United States*, 146 Ct. Cl. 421, 439, 175 F. Supp. 926, 936 (1959) as follows:

> Where Congress has by treaty or statute conferred upon the Indians or acknowledged in the Indians the right to *permanently* occupy and use land, then the Indians have a right or title to that land which has been variously referred to in court decisions as "treaty title," "reservation title," "recognized title," and "acknowledged title." As noted by the Commission, there exists no one particular form for such Congressional recognition or acknowledgment of a tribe's right to occupy permanently land and that right may be established in a variety of ways. [citing *Tee-Hit-Ton* v. *United States*, 348 U.S. 272 (1955); *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86 (1949); *Minnesota* v. *Hitchcock*, 185 U.S. 373 (1902).]

The significance of the recognized title doctrine generally lies in the fact that a plaintiff successful on this issue need not present proof demonstrating aboriginal use and occupancy. *Minnesota Chippewa Tribe*, *supra*, at 445. The theory has special interest to the claimants in this case, since it was their failure to prove "exclusive use" which resulted in their defeat on the aboriginal title claims discussed above.

Although the claimants need not demonstrate "exclusive use" to show possession of recognized title, they must still prove that Congress intended to recognize that they had the right to permanently use and occupy the land area under scrutiny. This requirement has long been a part of the recognized title doctrine as enunciated by the Commission and the courts. As we stated in *Sac & Fox Tribe* v. *United States*, 161 Ct. Cl. 189, 197, 315 F. 2d 896, 900, *cert. denied*, 375 U.S. 921 (1963):

> Appellants apparently assume that "recognition" or "acknowledgment" necessarily follow from an acceptance by the United States of the bare fact that the particular Indians dwelt or hunted, or claimed to dwell or hunt, in the area at that time. But there must be another indispensable element before recognition is had. *The Congress must affirmatively intend to grant the right to occupy and use the land permanently.* (Emphasis supplied.)

Taking a close look at each treaty, we have determined that the claimants have failed to show the necessary Congressional intention to grant them "permanent" rights in Royce Area 11. They have failed to demonstrate that the "recognition" involved here was anything more than "permissive occupation." *See Sioux Tribe* v. *United States*, 205 Ct. Cl. 148, 500 F. 2d 458 (1974). The 1768 Fort Stanwix Treaty, upon which the Chippewa, Shawnee and Wyandot rely, was negotiated by the British to protect against a threatened Indian uprising. Furthermore, this treaty was entered into by the Six Nations of New York. It is very questionable what role, if any, was played by the Ohio tribes at this conference, since their representation was quite small and their "rank and file" never accepted the boundary drawn up by the agreement. The meetings in Pittsburgh during 1775 and 1776 occurred because of the Government's desire to maintain a semblance of Indian neutrality during the Revolutionary War; these informal gatherings cannot be viewed as Government recognition of Indian title. The Treaty of September 17, 1778, relied on by the Delaware claimants, was clearly a treaty of peace entered into by the Government to counter British propaganda that the Americans planned to confiscate Indian lands. At most, the guarantee of Delaware "territorial rights" as described in Article VI of the 1778 treaty can be read as a declaration of American intention to continue the former British policy of respecting Indian title where it was established against third parties.

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[5] Claims listed in the Opening Brief of Certain Appellants as "moral and equitable claims" are merely a repetition of plaintiffs' aboriginal title claims and are likewise without merit. *See Otoe & Missouria Tribe of Indians* v. *United States*, 131 Ct. Cl. 593, 131 F. Supp. 265, *cert. denied*, 350 U.S. 848 (1955).

By the end of the American Revolution, the intent of the United States Government was "unequivocally the opposite of what is required to establish recognized title." 31 Ind. Cl. Comm. at 107. Through the post-Revolutionary War era until 1795, the Government attempted through its military might and its skills at the negotiating table to rid Royce Area 11 of the appellants. The first treaty negotiated after the close of the War was the Treaty of Fort Stanwix of October 22, 1784, in which the Government attempted to convince the tribal representatives of the Six Nations that Indian title had been relinquished by their ally, Great Britain, in the Treaty of Paris of 1783. This so-called "right of conquest" theory is evidence of the Government's intention not to acknowledge Indian title, but to make peace with formerly hostile Indians and at the same time to obtain clear rights to lands northwest of the Ohio River. This doctrine was also used in various talks with the Wyandot, Delaware, Ottawa, Chippewa, and Shawnee during 1785–1786 but proved, in the end, to be unsuccessful in maintaining peace in Royce Area 11. Instead, augmented by British agents, the Indian hostility remained. Toward the end of 1787, in response to pleas for another treaty, a Congressional committee recommended to the Congress that the "policy of conquest" be replaced by a policy in which the Government would negotiate and "purchase" the Indian lands in question. Congress then authorized Governor St. Clair of the Northwest Territory to negotiate with the dissident tribes, instructing him as follows:

> The primary objects of the treaty are, the removing [of] all causes of controversy, so that peace and harmony continue between the United States, and the Indian tribes, the regulating [of] trade, and settling boundaries * * * *

This change in policy does not demonstrate, as claimed by several of the appellants, that the Government had determined to recognize Indian title to this area. To the contrary, the Government's instructions to its representative demonstrate that its motives were otherwise. Furthermore, the Government's activities in encouraging settlement in this region pursuant to the Ordinance of May 20, 1785, does not show an intention to recognize Indian title. Thus, we have concluded, after reviewing the evidence presented to the Commission, that the treaties and policies cited by appellants do not show that any of them had "recognized title" to any part of Royce Area 11.

The Government's Cross-Appeal as to Royce Area 11. We also affirm the Commission's finding of aboriginal title for the Delaware and Shawnee Tribes in the two relatively small portions of Royce Area 11. In describing the area of land awarded to the Delaware Tribe, the Commission stated:

> Delaware presence in [the upper Muskingum and its tributaries] during [1742 to 1781] was overwhelmingly predominant and lasted a long time. Those incidents of use and occupancy by other Indians we view as permissive or as so sporadic as not to be inconsistent with Delaware use and occupancy * * * * Based upon the evidence in this record, we conclude that as of the date of the 1795 Treaty of Greeneville, the Delaware Indians pos-

> sessed aboriginal title to that portion of Royce Area 11 included within the present-day counties of Tuscarawas, Coshockton and Muskingum in Ohio.

31 Ind. Cl. Comm. at 121. With regard to the Shawnee award tract, the Commission found that:

> The Shawnees continuously used and occupied this area from the late 1730's until they were forced to abandon these lands in the late 1770's * * * * Until they were forced out in the late 1770's, the Shawnees had established Indian title to the area bounded on the north by an east-west line running along the 40th degree north latitude and on the south by a straight line running from the city of Athens in Athens County west to the town of Highland in northern Highland County, and bounded on the east and west by the lines described in note 6 of the findings of fact as the east and west boundaries of central Royce Area 11.

31 Ind. Cl. Comm. at 122–23. Defendant appeals from this portion of the Commission's opinion, claiming that (1) the Commission's findings of fact do not support its ultimate determinations that aboriginal title existed for these portions of Area 11; (2) the Delaware and the Shawnee had abandoned their respective lands prior to 1789, and (3) the "prior sovereigns" of Virginia, Connecticut and the "Colonial Confederacy" extinguished Indian title to this land.

The thrust of defendant's first argument is that the Commission failed to use the correct standard of proof for determining aboriginal title. We acknowledge that the findings are not as clear and concise as they might have been. However, after much study, we have decided that the findings themselves are supported by substantial evidence. It is clear that the Commission, after finding that the two tribes in question enjoyed "predominance" over certain portions of Royce Area 11, restricted the determination of aboriginal title to that limited area of land over which the tribes in question enjoyed exclusive occupancy and control. We are not presented here with a situation in which we are unable to ascertain precisely what method the Commission utilized to arrive at its final decision. *Cf. Seminole Indians* v. *United States*, 197 Ct. Cl. 350, 455 F. 2d 539 (1972). Indeed, it would be unreasonable to conclude that the Commission would use a standard of proof other than the one with which it is so familiar, which it found so readily in the case law, and which it set forth so accurately in its opinion. Therefore, defendant's contentions concerning abandonment and extinguishment of title to these tracts of land are without merit and deserve no extended discussion in this opinion.

II

Having resolved the claims relating to Royce Area 11, we now turn to the remaining appeals. In the 1795 Greeneville Treaty, the Indians not only ceded Royce Area 11, but also relinquished their claims to 16 enclaves (described in Article III), five rights of passage (described in Article III), and four other areas (described in Article IV)—all of which were located north and west of the Greeneville Treaty Line. In the proceedings before the Commission, the Indian claimants sought to establish aboriginal title to these areas. In some instances they were successful; in others they were not. On appeal, we are primarily concerned with the areas in which the Commission found that the appellants had no aboriginal title. The Government's cross-appeal is limited to the Commission's determination in favor of the Wyandot.

The Commission found insufficient evidence of Indian title with respect to Royce Areas 12, 13, 14, and 15 in Ohio, Detroit and the surrounding area, the areas located at the Straits of Mackinac (Royce Areas 21, 22, and 23 in Michigan), Royce Area 25 (known as Clark's Grant), Royce Area 26 (the Vincennes Tract), and the lands traversed by three of the rights of passage. Several Indian groups have appealed from the Commission's determination as to these areas. In addition, the Ottawa Tribe claims it is entitled to participate in the Wyandot recovery for an area around Fort Sandusky in Ohio. The Peoria Tribe of Oklahoma (representing the Weas) asserts that the Commission erred in denying recovery for the Ouatanon enclave and that the Peoria Tribe is entitled to participate in the recoveries of the Miami Tribe. For the reasons given below, we reject the claims of the appellants, as well as the Government's cross-appeal, and affirm the Commission's determination as to all areas with the exception of the Ouatanon enclave. The findings of the Commission as to this enclave are not sufficient to enable us to decide the issue raised in the appeal by the Peoria Tribe.

The Vincennes Tract (*Royce Area 26, Indiana*). The Vincennes Tract, ceded to the United States in the 1795 Greeneville Treaty, was defined in Article IV of the Treaty as follows: "[t]he post of St. Vincennes on the river Wabash, and the lands adjacent, of which Indian title has been extinguished." The question before us is whether the appellants possessed aboriginal title to any part of what is known as the Vincennes Tract (Royce Area 26) at the time of the Greeneville Treaty.

The Commission found that the boundaries of the Vincennes Tract ceded at Greeneville were described in the 1803 Fort Wayne Treaty (7 Stat. 74) and that in the 1803 Treaty, the Indians acknowledged that any claims they may have had to this area were extinguished prior to 1795. The Commission further found that no Indian tribes possessed aboriginal title to the Vincennes Tract at the time of the 1795 Greeneville Treaty.

The Peoria/Piankeshaw and the Delaware Tribes appeal from this determination. They contend that the two tribes between them had aboriginal title to the area around St. Vincennes until 1803 (except as to that portion of the land which had been given to the French prior to the Greeneville Treaty). They also claim that the Indians ceded only an area of 180,000 acres at Greeneville and that in the 1803 Fort Wayne Treaty, the United States defined the ceded area around St. Vincennes in such a way that the tract was increased from the original cession of 180,000 acres to an area of 1.8 million acres. From this, they argue that the 1803 Treaty provided no additional consideration to the Indians for the increase in the amount of the ceded land, and that the Indian parties to the treaties are entitled to recover under the Indian Claims Commission Act for an unconscionable taking of property amounting to the difference between the 1.8 million acres and the 180,000 acres originally ceded in 1795. We hold that the Commission's determination is supported by substantial evidence and is correct as a matter of law. Therefore, we reject appellant's arguments to the contrary.

The Greeneville Treaty did not specifically delineate the boundaries of the Vincennes Tract; rather the treaty makes only a vague reference to lands in which title had previously

been extinguished. The record shows that the Indians had given the French an area of land surrounding St. Vincennes in about 1742, but the size of the grant was not clearly defined. *See*, L. Lux, *Vincennes Donation Lands* 428–29 (1949); Carter, *Territorial Papers of the United States*, Vol. II 58–59 (1934). Nor were the boundaries of the French grant subsequently clarified under the periods of British and American control prior to 1795. While the United States did institute a land grant system in 1788 under which it is estimated that the United States eventually distributed about 180,000 acres in the Vincennes area (*see*, L. Lux, *supra*, at 444–46, 478, 481), there is no indication that these grants bore any relationship to the total amount of land which the Indians had given the French and which were subsequently ceded to the United States at Greeneville. Thus, there was apparently no definite understanding at the time of the Greeneville Treaty concerning what lands had previously been alienated by the Indians.

It was only after the Greeneville Treaty that the Governor of the Indiana Territory, William Henry Harrison, undertook to define the boundaries of the Vincennes Tract. Because of the uncertainty, even at that time, as to the extent to which the Indians had alienated the land around Vincennes prior to Greeneville, Harrison began negotiations with the Indians in the Vincennes area with a view toward establishing the boundaries by agreement. These negotiations culminated in the 1803 Fort Wayne Treaty, by which the parties agreed to the cession of approximately 1.8 million acres.[6] The 1803 Treaty is the first time that the boundaries of these lands were clearly defined, and there is no indication that the 1803 Treaty increased the size of the Vincennes Tract, as appellants argue. The 1803 Treaty was intended to define the scope of the earlier cession, not to change it. Under these circumstances, we do not find the absence of additional consideration a factor [7] which entitles appellants to recover.

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[6] The First Article of the Fort Wayne Treaty of June 7, 1803, provided:

"Whereas it is declared by the fourth article of the treaty of Greeneville, that the United States reserve for their use the post of St. Vincennes and all the lands adjacent to which the Indian titles had been extinguished: And *whereas*, it has been found difficult to determine the precise limits of the said tract as held by the French and British governments: it is hereby agreed, that the boundaries of the said tract shall be as follows: Beginning at Point Coupee on the Wabash, and running thence by a line north seventy-eight degrees, west twelve miles, thence by a line parallel to the general course of the Wabash, until it shall be intersected by a line at right angles to the same, passing through the mouth of White river, thence by the last mentioned line across the Wabash and towards the Ohio, seventy-two miles, thence by a line north twelve degrees west, until it shall be intersected by a line at right angles to the same, passing through Point Coupee, and by the last mentioned line to the place of beginning." 7 Stat. 78.

In other cases, we have relied upon subsequent treaties to define the boundaries of lands covered by the Treaty of Greeneville (*see Miami Tribe* v. *United States*, 146 Ct. Cl. 421, 442, 175 F. Supp. 926, 938 (1959)). We follow the same practice in this instance where the question is one of defining the boundaries of the land ceded to the United States at Greeneville.

At Greeneville, the Indians ceded the lands surrounding St. Vincennes to which title had previously been extinguished. This area was defined in the 1803 Treaty as the entire area now included in Royce Area 26. Consequently, appellant's attempt to prove aboriginal title to this area or any part of it in 1795 by evidence of use and occupancy was not successful.

Even if it is conceded that the Delawares and the Piankeshaws had used a part of the Vincennes Tract prior to Greeneville, as appellants argue, such shared use, without more, would not constitute the exclusive use and occupancy required to establish aboriginal title.

Clark's Grant (*Royce Area 25, Indiana*). Clark's Grant is a tract of 150,000 acres of land located in southern Indiana which was ceded to the United States for the use of George Rogers Clark and his men by Article IV of the Greeneville Treaty.[8] The appellants [9] claim that the Commission erred

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[7] Before the Commission, the appellants claimed that they had aboriginal title in 1795 to part of Royce Area 26. In order to recover, they had to show not only that they used this area prior to 1795, but also that the entire area had not been alienated prior to 1795. In the proceedings before the Commission, the appellants had an opportunity to put in evidence on both points or to respond to the Government's evidence concerning the Indian alienation of the land in the Vincennes area prior to 1795. Under the circumstances, we do not think the Commission erred in relying upon the 1803 Treaty to establish the extent of pre-Greeneville alienation. Nor is it appropriate to remand the case to enable the appellants to put in evidence to show that the pre-Greeneville alienation was smaller than the estimated 180,000 acres distributed by the United States.

[8] Subsection 1, Article IV, of the 1795 Greeneville Treaty provided:

"The tract of one hundred and fifty thousand acres near the rapids of the river Ohio, which has been assigned to General Clark, for the use of himself

in finding they had no aboriginal title to this area. They argue (1) that, since this area contains only 150,000 acres, proof of specific village locations within the area should not be required to establish Indian ownership; (2) that appellants' showing of use and occupancy of the adjoining areas should be sufficient to cover this area, and (3) that the findings of the Commission on this issue are self conflicting.

While the Commission found that the appellants had title to several different pieces of land adjacent to Royce Area 25 (*see* 31 Ind. Cl. Comm. 89, 131), there is a lack of evidence showing exclusive use and occupancy of Royce Area 25 by any one tribe or a united group of tribes. Appellants have based their claim upon the shared use of this land by the neighboring tribes, and they ask for a recovery to be divided among the several tribes. As previously stated, the mere fact that two or more different tribes shared the use of the land is insufficient to establish joint Indian title to the property. Since the appellants have not made the requisite showing of exclusive use and occupancy, we find that the Commission's determination is supported by substantial evidence.

There is no "logical contradiction" in the Commission's finding that the United States "perfected its title" to Clark's Grant in the Greeneville Treaty and its finding that none of the appellants had title to this tract. At Greeneville, the Indians jointly acknowledged the earlier grant to Clark and the United States confirmed its title to this land.[10] Appellants failed to show either an aboriginal or a recognized

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and his warriors [shall be excepted from the general relinquishment of claims by the United States to land north and west of the Greeneville Treaty Line]". 7 Stat. 51.

[9] The appellants on this claim are the Peoria (Piankeshaw/Wea) plaintiffs in Docket 338, the Delaware plaintiffs in Dockets 27–B and 338, and the Miami plaintiffs in Docket 252.

[10] The original grant to Clark was made long before the Greeneville Treaty. On June 16, 1779, after Clark captured Vincennes from the British, Clark received a "deed of gift" to what is now known as Clark's Grant. The "deed of gift" was signed by the Piankeshaw chief, Francis son of Tobacco, who made the gift in the names of "all the Great Chiefs and Warriors of Ouabash and their allies." At that time, Clark was a Colonel in the Virginia milita, and he accepted the lands as a possible site for a fort.

In 1784, Virginia ceded its claims to this tract along with its claims to other tracts northwest of the Ohio River to the States of the Confederation. The United States held this title until the Indians ceded their rights to Clark's Grant in 1795.

title interest in this land. The fact that they collectively granted it to Clark and subsequently acknowledged the grant in the Greeneville Treaty, does not give them a compensable interest in the land.

Royce Areas 12, 13, 14, 15. and the Rights of Passage. Royce Areas, 12, 13, 14, and 15 are separate tracts (or enclaves), located north and west of the Greeneville Treaty line, which were ceded to the United States at Greeneville.[11] As to these areas, the Commission found that none of the Indian claimants had aboriginal title in 1795. The Commission also found that Royce Areas 12, 13, and 14 were located so close to the Greeneville Treaty Line that they should be treated as appendages of the nearby portions of Royce Area 11. Moreover, the Commission found that the sporadic use of Royce Area 15 by various groups did not support a finding of aboriginal title in any tribe.

Several Indian tribes are appealing from this decision.[12] These appellants all argue, at least in part, that these areas should be treated the same as Royce Area 11 and that the various Indian tribes shared the use of the land, thus acquiring a common compensable interest or a "joint aboriginal title." We rejected this argument in our discussion of the Vincennes Tract, Clark's Grant, and Royce Area 11, and we need not discuss it further. The fact that Royce Area 14 is adjacent to Royce Areas 165 and 166, which were granted to the Shawnee by Article 6 of the Treaty of September 29, 1817, (7 Stat. 162), and that Royce Area 14 was relatively close to Shawnee settlements in Royce Area 11 in the late 1770's and early 1780's, does not establish exclusive use and

occupancy by the Shawnee of Royce Area 14. Since there is little or no evidence of exclusive use and occupancy by any tribe or unified combination thereof in any of these areas, we hold that the Commission's determination is supported by substantial evidence.

Article III of the Greeneville Treaty also granted the United States free passage over certain routes on the Indian side of the Greeneville Treaty Line. These rights of passage were not cessions, but they nevertheless constituted a grant of valuable property rights. Only three of the rights of passage are in issue on appeal—those designated by the Commission as routes 1, 2, and 3. As to these, the Commission found that appellants had no aboriginal title interest.[13] Here again, the appellants[14] argue that they have a compensable interest by virtue of their shared usage of the land traversed by the rights of passage. We cannot accept this position for the reasons previously stated in the discussion of the claims to Royce Area 11. Accordingly, the decision of the Commission on this issue is affirmed.

Royce Areas 21, 22, and 23. These areas consist of land on Mackinac Island and the northern tip of lower Michigan at the Straits (Royce Area 21), the southern tip of the upper Michigan peninsula (Royce Area 22), and the Island of Bois Blank located a few miles from the Straits (Royce Area 23). The appellants[15] contend that the Commission erred in finding that they had no aboriginal title to these areas; again, they argue that their shared use of the land made them joint owners of the land. This contention is rejected on the same grounds which we have discussed in denying similar claims.

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[11] Royce Areas 12 through 15 are described in Article III of the Greeneville Treaty as follows: *Royce Area 12:* "One piece of land six miles square at or near Loromie's store;" *Royce Area 13:* "One piece two miles square at the head of the navigable water or landing on the St. Mary's river, near Girty's town;" *Royce Area 14:* "One piece six miles square at the head of the navigable water of the Au-Glaise river;" *Royce Area 15:* "One piece six miles square at the confluence of the Au-Glaise and Miami rivers, where Fort Defiance now stands." 7 Stat. 50.

[12] The Miami Tribe in Docket 252 has filed an appeal with respect to Areas 12 and 13; the Shawnee in Dockets 335 and 338 has appealed with respect to Royce Areas 12, 13, and 14; the Ottawa plaintiffs in Docket 338 appeal the determination in Areas 13, 14, and 15; the Wyandot in Docket 120 and the Shawnee in Docket 64 join in appealing the determination as to Areas 12, 13, 14 and 15; and the Chippewa plaintiffs in Docket 13–G appeal the determination with respect to Area 15.

[13] The rights of passage described in the last paragraph of Article III of the Greeneville Treaty are nearly all over the waters of navigable rivers. The portions that traverse land are (1) that portion of the first passage running from Loromie's store (Royce Area 12, Ohio) to the St. Mary's River (the portage path meets the St. Mary's River within Royce Area 13, Ohio); (2) that portion of the second passage running from Loromie's store (Royce Area 12, Ohio) to the Au-Glaize River at a point within Royce Area 14—this passage includes the portage between Royce Areas 12 and 13 and then proceeds through Royce Area 87 for a distance of approximately nine miles to Royce Area 14; and (3) that portion of the third described passage running from Loromie's store (Royce Area 12) to the Sandusky River (this passage most probably proceeded across south-central Royce Area 87 for a distance of approximately 60 miles). *See* 31 Ind. Cl. Comm. 89, 202–03.

[14] The Wyandot plaintiffs in Docket 120, the Shawnee in Docket 64, the Chippewa in Docket 13–G, and the Shawnee and Peoria in Dockets 335 and 338, and the Ottawa plaintiffs in Docket 338 all appeal the Commission's determination with respect to the rights of passage.

[15] The appellants in this instance are the plaintiffs in Dockets 18–M and 40–F (Ottawa and Chippewa), as well as the Potawatomie Tribe, plaintiffs in Docket 15–E.

The Ottawa and Chippewa appellants make the further argument that they should be treated as joint owners of these lands in the same way as was done with Royce Area 205, which is adjacent to the lands in issue here (*see* 7 Ind. Cl. Comm. 576). The Ottawa and Chippewa parties in this appeal were the plaintiffs in that case, where the Commission found that the Ottawa and Chippewa Tribe had aboriginal title to Royce Area 205, primarily because they found that the Ottawa and Chippewa had formed a single entity sometime after 1795 and before 1836. The appellants here have not shown evidence of such unity prior to 1795. The fact that these tribes combined into a single entity after 1795 does not show that they jointly owned the land prior to that date. The Commission found that in 1795 Royce Areas 21, 22, and 23 were areas of common use and occupancy by autonomous bands of the Ottawa and Chippewa Indians and that they failed to establish aboriginal title. We find this determination is supported by substantial evidence.

Detroit and Surrounding Area. This area consists of approximately 288,000 acres around Detroit. In this appeal, the Wyandot Tribe argues that the Commission erred in finding that no tribe possessed aboriginal title to the area surrounding Detroit in 1795. The Ottawa Tribe and the Prairie Band of the Potawatomie Indians also appeal from the Commission's decision on the ground that they shared the use of this area with other tribes and thus acquired a joint interest in the land, for which they are entitled to compensation.

The main issue is whether the Wyandot Tribe established aboriginal title to the land. The evidence shows that Cadillac founded a post at Detroit in 1701. From 1710 to 1720, four tribes had settlements around Detroit: Chippewa, Potawatomi, Ottawa, and Wyandot (Huron). While the Chippewa never established a strong presence in the area, the other tribes shared the use of these lands for about half of the Eighteenth Century. The Ottawas occupied a village near

Detroit until 1763, when they moved south into the Maumee River area of Ohio; the Potawatomis occupied a village in the ceded area from 1710 to approximately 1764 when they left the area; and the Wyandots maintained a settlement in the area from 1705 to 1742 when they moved across the Detroit River into present-day Ontario. The period of mixed occupancy up to approximately 1763 shows that no tribe or unified tribal combination had the requisite exclusive use and occupancy to establish aboriginal title up to that time.

The Wyandot claim is based primarily on the fact that in 1777 they established two village sites at present Wyandotte and Gibraltar, Michigan, within the ceded area, and that they remained there until 1796. The Commission found that no other Indian groups were in the area during these years. The Wyandot conclude that this is sufficient proof of exclusive use and occupancy to establish Indian title in 1795. The Wyandot position does not account for the fact that whites had moved into the Detroit area in relatively large numbers prior to the Greeneville Treaty. The Commission found that shortly after Cadillac's settlement of Detroit, whites were granted lands adjacent the Fort.

Later, several tracts of land were sold or granted by Indians to settlers. By 1788, there were approximately 4,000 whites settled on both sides of the Detroit River. The area for several miles around the post of Detroit was farmland. The Commission found that by 1795 most of the Detroit area was occupied by whites.

In this instance, we are not presented with a question of whether the white intrusion on Indian land extinguished a previously established aboriginal title. *Turtle Mountain Band* v. *United States*, 203 Ct. Cl. 426, 447–48, 490 F. 2d 935, 947 (1974). Nor is the white settlement on the land being used to establish a date for the extinguishment of Indian title. *United States* v. *Pueblo of San Ildefonso*, *supra*, slip op. at 12; *United States* v. *Northern Paiute Nation*, 203 Ct. Cl. 468, 474–75, 490 F. 2d 954, 958 (1974). Here, the Wyandot Tribe did not have aboriginal title at the time of white settlement, which began in the early Eighteenth Century and increased thereafter. The presence of white settlers in the area shows that the Wyandot Tribe did not exclusively use and occupy the entire Detroit area prior to 1795. On the basis of the evidence in the record, we conclude that the Commission's determination of this factual issue is supported by substantial evidence.

It is not necessary to discuss the claims of the Ottawa and the Prairie Band of the Potawatomi which are also based on the shared use theory. This argument has been treated in our discussion of Royce Area 11, and, again, we rely on the reasons given there in rejecting this claim.

Ouatanon or the Old Wea Towns. This area, ceded in Article III of the Greeneville Treaty, was described as "[o]ne piece six miles square at the Ouatanon or old Weea towns on the Wabash river." While the Commission found that this area was located within the aboriginal area of the Wea Nation in 1795, which at that time was a part of the Miami Tribe, the Commission also found that the area was subsequently returned to the Indians by the Treaty of September 30, 1809 (7 Stat. 113); that it was receded to the United States as part of Royce Areas 98 and 99 by the Wea and Miami Tribes in the Treaties of October 2, 1818 (7 Stat. 186) and October 6, 1818 (7 Stat. 189); that the Wea had been compensated for most of the land as part of Royce Area 99, and that a small portion of the ceded land north of the Wabash River is included within the claim of the Peoria Tribe in another docket (Docket 314–A) before the Commission. Consequently, the Commission determined that the Indians were not entitled to recover for this enclave.

Appellant[16] takes issue with this conclusion for several reasons, one of which is that the evidence before the Commission is insufficient to show that the Weas were compensated for this land, even in part, through the recovery for Royce Area 99. After reviewing the briefs, treaties, cited cases, and after oral argument, we find that the Commission's determination on this issue is too summary for us to decide whether the Commission's findings are supported by substantial evidence or whether the conclusions of law are valid and supported by the findings of fact.

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[16] The appellant in this instance is the Peoria Tribe of Indians of Oklahoma in Docket 338, representing the Wea.

Article 8 of the Treaty of September 30, 1809, provided that "[t]he United States agree to relinquish their right to the reservation, at the old Ouroctenon towns, made by the treaty of Greenville, so far at least as to make no further use of it than for the establishment of a military post." (7 Stat. 114). It is significant that the Weas were not a party to this treaty, although they subsequently gave their consent (7 Stat. 116). Also, it is unclear which tribes received the rights to this area and what rights were received. Furthermore, the record does not show whether the Ouatanon enclave was included in the 1818 cessions by the Weas or the Miamis. We therefore conclude that the Commission has not furnished a sufficient statement of the reasons for its findings and conclusions under 25 U.S.C. § 70r(3) for us to review the Commission's decision on this issue. (*See Sac & Fox Tribe* v. *United States*, 196 Ct. Cl. 548 (1971); *United States* v. *Nez Perce Tribe*, 194 Ct. Cl. 490, 503, *cert. denied*, 404 U.S. 872 (1971)), and we remand this portion of the case for further proceedings.

The Area Around Fort Sandusky and Royce Area 20. Article III of the Greeneville Treaty ceded to the United States the following area around Fort Sandusky: "[o]ne piece six miles square upon Sandusky lake, where a fort formerly stood." The Treaty describes Royce Area 20 as "[o]ne piece two miles square at the lower rapids of the Sandusky river." These areas are located in northern Ohio on or near Lake Erie. The Commission found that the Wyandot had Indian title to these areas because of their use of the Fort Sandusky area from 1737 to 1748 and from the early 1750's until after 1795 and on the basis that the Wyandots had exclusive use and occupancy of the land in Royce Area 20 from 1760 to 1794. The Commission further found that two bands of Ottawas settled in the Fort Sandusky area from 1784 to 1811 but that the use and occupancy by the Ottawas was with the permission of the Wyandots.

The Ottawa appellants take issue with the decision to the extent that it does not allow them to participate in the recovery for the Fort Sandusky area. They argue that the Commission found the Ottawas had two settlements in this area prior to 1795, that there is no evidence upon which to conclude that this use was by permission of the Wyandot, and that even if their use was by permission of the Wyandot, they have a compensable interest by virtue of their shared use of the property. We hold that there is substantial evidence to support the Commission's decision on this point. The Wyandot had been in the area around Sandusky for more than 30 years prior to the Ottawa settlements. There is evidence that the Wyandot had given permission to other Indian tribes to use their lands in Ohio, and we think the record, taken as a whole, supports the inference that the Ottawa were in the Sandusky area with the consent of the Wyandot. Permissive use by the Ottawa did not diminish the title of the Wyandot, and by the same token, such use gave the Ottawa no interest in the land. *The Spokane Tribe of Indians* v. *United States*, 163 Ct. Cl. 58, 68 (1963).

The Government also appeals from the Commission decision concerning the area around Fort Sandusky and from the determination as to Royce Area 20, claiming that Indian title to these enclaves had been extinguished by prior sovereigns before March 3, 1789, with the result that the Wyandot did not have aboriginal title at the time of the Greeneville Treaty. The Government takes the position that Virginia, Connecticut, or the Colonial Confederacy extinguished Indian title to these enclaves as well as to certain areas within Royce Area 11. The Commission found that the inclusion of the Fort Sandusky area within Connecticut's Western Reserve had no effect on the aboriginal title of the Wyandot to this area, which was ceded to the United States in 1795. We have considered the Government's arguments on prior extinguishment and conclude, as did the Commission, that the Wyandot held aboriginal title to these enclaves at the time of the Greeneville Treaty.

Wea Participation in Miami Recoveries. The Wea are currently one of the constituent tribes of the Peoria appellants in Docket 338. Before the Commission, the Wea claimed that they were entitled to a one-third interest in any Miami recoveries resulting from the Greeneville Treaty by virtue of the fact that the Miami, Eel River, and Wea had formerly been one nation and were a nation at the time of the 1795 Greeneville Treaty. The Commission did not go so far as to find what interest, if any, the Weas would have in any

Miami recoveries, but the Commission did find that the Weas were part of the Miami Tribe in 1795.

The Miami appellant takes issue with the Commission's finding to the extent that it would allow the Weas to share in Miami recoveries. With the exception of Royce Areas 16 and 17, and a portion of the fifth described passage in Article III of the Greeneville Treaty, we have found that the Miami did not have a compensable interest in any of the lands ceded to the United States at Greeneville. Consequently, the question of Wea participation in Miami recoveries only concerns the recovery, if any, for two of the enclaves and one right of passage in which the Commission found the Miami held aboriginal title in 1795.

The appellant claims that the Weas had no interest in the disputed property because the Weas did not occupy or control any of these lands or have a recognized title interest. Appellant argues further that the statement in the Grouseland Treaty that the Miami, Eel River, and Wea were "one nation" prior to 1805 did not constitute a retroactive determination that each tribe owned an undivided interest in the property of the other 10 years before the Grouseland Treaty. Finally, appellant argues that such intertribal relations were political rather than land-owning.

The evidence shows that the Miami, Eel River and Wea considered themselves as an entity and that they agreed to hold their property in common. Article IV of the Grouseland Treaty, signed August 21, 1805, provided:

> As the tribes which are now called the Miamis, Eel River and Weas, were formerly and still consider themselves as one nation, and as they have determined that neither of these tribes shall dispose of any part of the country which they hold in common; in order to quiet their minds on that head, the United States do hereby engage to consider them as joint owners of all the country on the Wabash and its waters, above the Vincennes tract, and which has not been ceded to the United States, by this or any former treaty; * * *" (7 Stat. 91-92)

The Grouseland Treaty is an acknowledgment by the parties to the treaty that the Miami, Eel River, and Wea had formerly been an entity prior to 1805 and that they held their property in common. This was the basis for considering them to be joint owners of the property in 1805. In a letter to the Secretary of War, dated March 22, 1814, William Henry Harrison stated:

> The Miamies have their principal settlements at the forks of the Wabash, thirty miles from fort Wayne; and at Mississineway, thirty miles lower down. A band of them under the name of weas [sic], have resided on the Wabash sixty miles above Vincennes; and another under the Turtle on Eel river, a branch of the Wabash, twenty miles northwest of fort Wayne. By an artifice of the Little Turtle these three bands were passed on general Wayne as distinct tribes, and an annuity was granted to each. The Eel river and Weas however to this day call themselves Miamies, and are recognized as such by the Mississineway band.

The Commission has on two previous occasions found the Weas to have been a constituent part of the Miami Nation in the period prior to 1795 (*see* 2 Ind. Cl. Comm. 617, 618; 5 Ind. Cl. Comm. 180, 181) and these decisions were affirmed in pertinent part in 146 Ct. Cl. 421 (1959). This evidence supports the Commission's determination that the Wea were part of the Miami Tribe in the Eighteenth Century and as such they are entitled to participate in the Miami recoveries.

As for the division of interests, the Commission did not specify the percentage of recovery which should be given to the Wea, and neither party asks us to make such a determination. Accordingly, the allocation of interests is to be decided by the Commission on remand.

III

In conclusion, we hold, with one exception, that the Commission has correctly resolved the numerous issues involving Royce Area 11 and the smaller areas north and west of the Greeneville Treaty Line. Accordingly, we affirm the Commission's determinations in these matters. As previously stated, that portion of the Commission's decision dealing with the Ouatanon enclave is remanded to the Commission for additional proceedings in accordance with this opinion. Since the amount to be recovered by the several appellants was not involved in the Commission's interlocutory decision, we also remand the case for further proceedings in that regard.

REMANDED

U.S. GOVERNMENT PRINTING OFFICE: 1973

No. 75-389

Supreme Court, U. S.
FILED
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In the
Supreme Court of the United States
October Term, 1975

JAMES STRONG, et al.,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

APPENDICES B, C, D, E and F TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

(Appendix A, the decision of the United States Court of Claims, is bound with the petition for writ of certiorari)

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APPENDICES B, C, D, E and F TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

(Appendix A, the decision of the United States Court of Claims, is bound with the petition for writ of certiorari)

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APPENDIX B

Findings of Fact, Opinion and Orders of the Indian Claims Commission rendered August 9, 1973, 31 Ind. Cl. Comm. 89-222

[89] BEFORE THE INDIAN CLAIMS COMMISSION

JAMES STRONG, *et al.*, as the representatives and on behalf of all members by blood of the CHIPPEWA TRIBE OF INDIANS,	Docket No. 13-G
THE POTTAWATOMIE TRIBE OF INDIANS, THE PRAIRIE BAND OF THE POTTAWATOMIE TRIBE OF INDIANS, *et al.*,	Docket No. 15-E
RED LAKE BAND, *et al.*,	Docket No. 18-M
THE DELAWARE TRIBE OF INDIANS.	Docket No. 27-B
HANNAHVILLE INDIAN COMMUNITY, *et al.*,	Docket No. 29-C
ROBERT DOMINIC, *et al.*, on behalf of THE OTTAWA TRIBE OF INDIANS,	Docket No. 40-F
SHAWNEE TRIBE OF INDIANS OF OKLAHOMA, *et al.*,	Docket No. 64
THE SIX NATIONS, *et al.*,	Docket No. 89
LAWRENCE ZANE, *et al.*, *ex rel.* WYANDOT TRIBE, *et al.*,	Docket No. 120

IRA SYLVESTER GODFROY, *et al., ex rel.* THE MIAMI INDIAN TRIBE,	Docket No. 130
MIAMI TRIBE OF OKLAHOMA, *et al.,*	Docket No. 252
EASTERN SHAWNEE TRIBE OF OKLAHOMA, *et al.,*	Docket No. 335
ABSENTEE DELAWARE TRIBE OF OKLAHOMA, *et al.,*	Docket No. 338
EASTERN SHAWNEE TRIBE OF OKLAHOMA, *et al.,*	Docket No. 338
CITIZEN BAND OF POTAWATOMI INDIANS OF OKLAHOMA, *et al.,*	Docket No. 338
THE PEORIA TRIBE OF INDIANS OF OKLAHOMA, *et al.,*	Docket No. 338
THE KICKAPOO TRIBE OF OKLAHOMA, THE KICKAPOO TRIBE OF KANSAS, *et al.,*	Docket No. 338
THE OTTAWA TRIBE OF OKLAHOMA, *et al.,* *Plaintiffs,*	Docket No. 338
v.	
THE UNITED STATES OF AMERICA,	

[90]

Decided: August 9, 1973

Appearances:

Robert C. Bell, Jr., Attorney for Plaintiffs in Docket 29-C.

Rodney J. Edwards, Attorney for Plaintiffs in Dockets 18-M and 120.

James R. Fitzharris, Attorney for Plaintiffs in Dockets 13-G, 40-F, and 64.

Allan Hull, Attorney for the Ottawa and Kickapoo Plaintiffs in Docket 338.

Robert S. Johnson, Attorney for Plaintiffs in Docket 15-E.

Jack Joseph, Attorney for Plaintiffs in Docket 335, and for the Peoria and Shawnee Plaintiffs in Docket 338.

David L. Kiley, Attorney for Plaintiffs in Docket 130. Albert C. Harker was on the brief.

Paul G. Reilly, Attorney for Plaintiffs in Docket 89.

Louis L. Rochmes, Attorney for Plaintiff in Docket 27-B, and for the Delaware and Potawatomi Plaintiffs in Docket 338.

[91] Edwin A. Rothschild, Attorney for Plaintiffs in Docket 252.

Joseph S. Davies, Jr., with whom was Mr. Assistant Attorney General Shiro Kashiwa, Attorneys for Defendant.

OPINION OF THE COMMISSION

Pierce, Commissioner, delivered the opinion of the Commission.

This consolidated proceeding involves the determination of title claims by the various plaintiffs to the area identified as Area 11 on Royce's Map of Ohio in Part II of the 18th Annual Report of the Bureau of American Ethnology, 1896-1897, as well as title claims to several smaller areas north and west of Royce Area 11, all of which were relinquished to the United States by the tribes signatory to the Treaty of Greeneville of August 3, 1795, 7 Stat. 49, and by the Six Nations who were signatories to the treaties of October 22, 1784, 7 Stat. 15, at Fort Stanwix, January 9, 1789, 7 Stat. 33, at Fort Harmar; and November 11, 1794, 7 Stat. 44, at Canandaigua.

Petitions were consolidated in the above-captioned proceedings by the Commission's order of January 22, 1954. In the same order, pursuant to a stipulation and agreement of the parties, it was also ordered that in subsequent proceedings herein, the plaintiffs in Docket 89, the Six Nations, *et al.*, would be deemed to have no compensable interest in any lands involved in these proceedings lying west of a line in western Ohio following the north to south courses of the Maumee, [92] AuGlaize and Great Miami Rivers, and that all of the remaining plaintiffs herein (except the Absentee Delaware plaintiffs in Docket 338 and the plaintiff in Docket 27-B, The Delaware Tribe of Indians) would be deemed to have no right, title or interest in any lands involved in these proceedings lying east of a line starting at the easternmost point of the city of Cleveland and proceeding in a southerly direction to the village of Peninsula, Ohio, on the Cuyahoga River, and thence southerly along the Cuyahoga River and around the western and southern boundaries of Akron to Lakemore, Ohio, and thence in a straight line southeasterly to the Ohio-West Virginia border at or about Wellsburg, West Virginia. By the terms of the order, the Delaware plaintiffs in Dockets 27-B and 338 were deemed to have no such right, title or interest in a less extensive area in northeastern Ohio roughly bounded by the Cuyahoga River on the west and the Cuyahoga and Mahoning Rivers on the south, plus a separate smaller area surrounding Steubenville in Jefferson County, Ohio, on the Ohio River boundary between Ohio and West Virginia.

Royce Area 11 encompasses approximately two-thirds of the present State of Ohio and a small contiguous portion of southeastern Indiana. The other areas relinquished by the Indians at Greeneville in 1795, the sixteen enclaves described in the second paragraph of Article III, and the four areas (described in Article IV) which were excepted from the Government's general relinquishment of claims to territory north and west of the Greeneville Treaty Line, as well as the rights of [93] passage relinquished by the Indians in the last paragraph of Article III of the treaty, are described individually in the findings of fact which follow this opinion.

Except in the case of the Chippewa plaintiffs in Docket 13-G, the defendant has acknowledged the rights of the various plaintiffs herein to bring these claims before the Commission. The defendant contends that these Chippewa plaintiffs cannot be deemed to have established any right to recover in a suit under the Indian Claims Commission Act (60 Stat. 1049) because there was no such landowning entity as the "Chippewa Nation" or "Chippewa Tribe." In our finding of fact No. 1(a) we have described the procedural history of the claim which has evolved into Docket 13-G. We have pointed out therein that this Commission has previously held, in *Red Lake Band* v. *United States*, Dockets 18-E, *et al.*, 7 Ind. Cl. Comm. 576, 579, 607 (1959), that the Chippewas were separate bands, and that we have also previously held, in *Saginaw Chippewa Indian Tribe* v. *United States*, Docket 57, 22 Ind. Cl. Comm. 502, 522 (1970), that Chippewas of the Saginaw participated in the 1795 Greeneville Treaty and were entitled to and received the benefits accorded the participating Indians to that treaty. In light of the prior history of Docket 13-G and the cited previous holdings of this Commission, we are of the opinion that the plaintiffs in Docket 13-G may properly bring this claim on behalf of and as representatives of the descendants of those Chippewas who were parties to the 1795 Greeneville Treaty. To deny them that [94] right at this point in these proceedings would not, in light of the procedural history of Docket 13-G, be proper, for to do so would deprive the descendants of those Chippewas who participated at the 1795 Greeneville Treaty of the rights which accrued to their ancestors at that treaty.

This proceeding presents several issues of law and matters of fact for the Commission's adjudication. Underlying the legal issues present is the complicated history of 18th century Ohio and the remainder of the Northwest Territory out of which these claims have grown. In an attempt to provide a full development of these historical events, the Commission has, in the following findings of fact, described in considerable detail the history of Royce Area 11, and the other areas at issue here, up to the 1795 Greeneville Treaty. These findings of fact chronicle the unique state of affairs which existed within Royce Area 11 from the advent of European involvement in Ohio in the late 17th century through the triumph and consolidation of American control during the last decade of the 18th century. During this entire period of 100 years the Indians may properly be termed to have been unwitting pawns in a battle of vast imperialistic proportions. Out of these events, it is necessary to separate and evaluate the roles of the various Indian tribes in the history of the areas at issue here and to determine the rights, if any, of these tribes.

At the beginning of the 18th century all of Ohio was essentially unoccupied and had been so for 50 years past. Up to about 1655 a [95] tribe of Indians known as the Eries had occupied a large portion of the area south of Lake Erie in Ohio. At the latter date the Iroquois Confederacy, based in upper New York State, conquered the Eries and destroyed this tribe as a viable political entity. Over the next several years the Iroquois defeated other tribes who lived along the Ohio River in southern Ohio. As a result, by the late 17th century Royce Area 11 was totally unoccupied.

The Iroquois, although conquerors of the tribes who had occupied Ohio, never occupied the area but did use it sporadically for hunting and passage on the way south and west on raids. The Iroquois hunted more extensively north of Lakes Erie and Ontario on the Ontario Peninsula, which had formerly been occupied by Huron (Wyandot) Indians and other tribes. During the 17th century, the Iroquois had pushed these Huron and other Indians westward to northern Michigan and the western shores of Lake Michigan.

Towards the end of the 17th century, the French interests in Canada and the English interests along the eastern coast of the present United States began to polarize. Each nation had its Indian allies, and in between them was a vast unoccupied area, including Ohio with its rich trade potential. The French, by 1700, had begun supporting the enemies of the Iroquois and, with French arms, the Iroquois threat was neutralized. In 1701 at Quebec, the Iroquois came to terms with the [96] French and their Indian allies. The Iroquois continued to hunt on the Ontario Peninsula (a crucial fact because had they been forced from Ontario they would inevitably have turned for hunting to Ohio), but they pledged neutrality as between the French and English, and agreed no longer to harass the western Indians. In that same year, Cadillac established the post of Detroit and, within a few years, several Indian tribes from north and west of Detroit had joined the French and settled there. Meanwhile on the English side of Ohio, the eastern Indians (Shawnees and Delawares) in Pennsylvania and Virginia, were slowly being pushed westward and closer to Ohio as white settlers began to occupy more and more land. Thus, by the early 18th century, the stage was set for the vacuum in Ohio to be filled.

There are no records of Indian settlements within Ohio during the early 18th century, but we do know that Indians from Detroit (among them Wyandots, Chippewas, Ottawas, Potawatomies and Miamis) used Ohio to hunt, and crossed Ohio to raid other tribes south of the Ohio River. Likewise, eastern Indians—Iroquois from New York and northwestern Pennsylvania, and Delawares and Shawnees from Pennsylvania and Virginia—began to enter Ohio for hunting and other purposes.

The French coveted Ohio for fur to trade and the same was true for the English. The English, however, were in the meantime continuously expanding their areas of settlement west from the Atlantic coast. This [97] created pressure upon the eastern Indians in Pennsylvania and Virginia, causing them to move westward. This phenomenon did not take place to any appreciable extent in reaction to French activities, although the French did encourage the western Indians to expand their hunting eastward into Ohio, and also encouraged the westward movement of the eastern tribes, both for trade purposes and to increase French influence among them.

The result of these European influences was that beginning in the 1730's and continuously thereafter various tribes from both east and west of Ohio moved into and settled in Ohio. The Shawnees moved in the late 1730's to central[1] Royce Area 11 where they settled at the mouth of the Scioto River. In the 1740's groups of Senecas and other Iroquois Indians moved into northeastern Ohio just across the Cuyahoga River from Royce Area 11.[2] They were joined shortly thereafter by Indians of several other tribes, including Delawares and Chippewas. Close by, and within Royce Area 11, a group of Ottawas established a settlement at about the same time. In the 1740's Delaware Indians began in significant numbers to move into Ohio from Pennsylvania, where they established settlements on the Muskingum River and along the Scioto River. At the same time additional Shawnees (along with some Senecas) migrated to Lower Shawnee Town at the mouth of the Scioto. In the late 1740's two groups

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[1] To facilitate analysis of Indian use and occupancy of Royce Area 11, we have divided it into four separate geographical segments, hereinafter referred to as the "northeastern", "southeastern," "central" and "western portions of Royce Area 11. The boundaries of these respective regions are described in notes 1, 3, 6 and 7 of the accompanying findings of fact.

[2] Those Iroquois Indians who settled in Ohio became generally known as "Mingoes". *See* findings of fact, n. 5.

of Miami Indians, trying to establish contacts with the English, moved eastward [98] from the main Miami settlement at present-day Fort Wayne and settled in western Royce Area 11, where they remained until the early 1750's when, under pressure from the French, they withdrew westward.

The areas settled by the various tribes in the 1740's set the geographical pattern for subsequent Indian use and occupancy within Royce Area 11 for the remainder of the 18th century. Northeastern Royce Area 11 became the scene of intermittent occupation by various tribes lasting until the 1795 Greeneville Treaty. This area was easily accessible from both east and west and offered excellent winter hunting. The eastern Indians, particularly the Iroquois from New York and Delawares from Pennsylvania could easily cross into northeastern Ohio. The western tribes used Lake Erie to come across from Detroit. There was extensive hunting and some temporary settlement in northeastern Ohio throughout the 18th century but no tribe was either able or inclined to occupy this region continuously.

Below this region, in southeastern Royce Area 11, the Delaware Indians, beginning in the 1740's, used and occupied a large area centered along the Muskingum River. The Delawares remained here for approximately 40 years, before fleeing from the Americans in the 1780's. Other tribes, however, also occupied this area sporadically, including Wyandots, Ottawas, Shawnees, and, along the Ohio River, Mingoes.

In central Royce Area 11, the Shawnees were predominant. They had several settlements along the Scioto River beginning in the late 1730's and continuing up to approximately 1780. The evidence also establishes the presence of Delaware Indians in this region, particularly [99] during the early years. Around 1780, the Shawnees capitulated to white military pressure and fled westward to the Great Miami and Mad Rivers in western Royce Area 11. They remained there until the late 1780's, when they moved north above Royce Area 11 in Ohio and west into Indiana.

Prior to the Shawnee move westward about 1780, the western portion of Royce Area 11 had not been permanently used for Indian settlements since the early 1750's, when the Miamis were forced by the French to evacuate their towns there. In the interim between these dates, western Royce Area 11 had been a common hunting ground for several tribes, including the Miamis, Shawnees, Wyandots and Cherokees.

From the time of the original Indian migrations into Ohio in the 1730's and 1740's until the French and Indian War, the Indians had been relatively free to live and hunt where they wished without undue interference from the Europeans. This was so because both the French and English were interested in maintaining alliances with the Indians and attempted not to abuse unnecessarily their often fragile relationships with the Indians. In addition, Ohio was vast enough to accommodate both Indians and whites without much interference between them. There was friction and warfare, such as Nicholas' conspiracy against the French and the French sponsored attack on La Demoiselle's Miami village, but this was sporadic.

With the expulsion of the French at the end of the French and Indian War, the Indians ceased to be the balance of power between opposing European interests. Instead, they became the adversary of the British [100] because they stood in the way of British land aspirations in Ohio. The British, by withholding gifts and ammunition, were quick to antagonize the Indians, who, for the most part, had sided with the French in the French and Indian War. The Indians just as quickly appraised the British intentions, and in 1763 they revolted, in a concerted effort led by the Ottawa chief, Pontiac, all across the northwest from Fort Pitt to Detroit. Although there was peace during the few years after Pontiac's uprising, the Indians remained wary of British intentions with respect to the lands the Indians were using and occupying in western Pennsylvania and Ohio.

In the face of another threatened uprising, the British and Indians treated at Fort Stanwix in New York in 1768. At this council, the Six Nations of New York and smaller groups of Mingoes, Delawares and Shawnees executed a treaty which established the Ohio River below Fort Pitt as the Indian-white boundary. This treaty was not greeted well by the Ohio Indians, primarily because the Six Nations of New York had taken the lead in negotiating and had made sure that most of their lands in New York were on the Indian side of the boundary. The Ohio Indians thought that the Six Nations of New York were giving away all lands in Pennsylvania and Virginia which were still freely used by numbers of Delawares, Shawnees and Mingoes.

Indian dissatisfaction with the Fort Stanwix Treaty led to a succession of Indian raids against the white settlements in Pennsylvania and Virginia. As a result, in 1774, the first of a succession of white military expeditions into Ohio took place (historically referred to as [101] "Lord Dunmore's War"). Lord Dunmore's expedition was directed against the Shawnees on the Scioto River. While militarily inconclusive, this expedition did destroy several Indian villages and awakened the Indians to the perils the white colonists to the east might bring.

When the American Revolution broke out soon after, the Indians overwhelmingly sided with the British, believing (correctly) that the Americans were after their lands, and (incorrectly) that the British would stand by them. As the tide of the Revolution turned in favor of the colonists, the Americans on several occasions marched into Ohio attacking the Shawnees in western Royce Area 11 and the Delawares on the Muskingum River.

By the late 1780's, after American victory in the Revolution, the Indians, under periodic military pressure and seeing the beginnings of American migration into Ohio, performed what would best be termed a tactical retreat. They moved their settlements west and north, continuing to use Royce Area 11 only to hunt and to raid the

Americans. This exodus from Royce Area 11 was anything but voluntary. They fought the Americans at every turn, inflicting serious losses in several battles, until, at the Battle of Fallen Timbers (when crucial British assistance failed to materialize), they were vanquished by General Anthony Wayne. Shortly thereafter, at the Treaty of Greeneville, they agreed to relinquish Royce Area 11.

Politically, the history of Royce Area 11 is equally complex. European claims to this area predate claims by all Indians except the Iroquois. French claims dated to LaSalle's annexation of the entire [102] Ohio Valley for France in 1682. English claims derived through the Iroquois, whom the English considered subjects of the British Crown. The English claim was based upon the fact that the Iroquois had conquered the Eries and thereby gained ownership of Ohio by right of conquest. The English, in 1701 and 1726, had the Iroquois execute the "beaver deeds." In these deeds the Iroquois claimed the western lands by right of conquest and deeded to the English a vast territory west of New York measuring approximately 800 miles east to west by 400 miles north to south, reserving to themselves the right to remove beaver from these lands.

At the council proceedings at Greeneville in 1795, certain of the tribes present made claims to large portions of Royce Area 11. The Miami chief, Little Turtle, asserted Miami ownership of an immense tract including significant parts of the present states of Ohio, Indiana, Illinois and Michigan. An Ottawa chief, claiming to speak on behalf of the "Three Fires" (the Ottawas, Chippewas and Potawatomis), claimed on behalf of these tribes the lands which had been ceded by the western tribes at Fort Harmar, which area was larger than that ceded at Greeneville.

There were also several Indian claims to portions of Royce Area 11 which antedated Greeneville. As early as 1751 and continuing until the 1780's, the Wyandots were acknowledged among certain of the Ohio Indians (particularly the Delawares) to have been the original owners [103] of a large portion of northeastern and southeastern Royce Area 11. By the time of Greeneville, however, the Wyandots had apparently disavowed any claim to the land, for it was the Wyandot chief, Tarke, who at Greeneville was urging upon the Americans that the lands the Indians were ceding there were owned in common by all. We further have record of the intertribal council held in 1750 at Lower Shawnee Town where a council of Ohio Indians consisting of Shawnees, Wyandots, Delawares and Mingoes agreed among themselves that all of Ohio east of the Great Miami River belonged to the Delawares, Shawnees and Mingoes, and that the Wyandots were free to hunt there; that the lands west of the Great Miami River were the property of a confederacy comprised of Miamis, Piankeshaws, Weas, Kickapoos and Mascoutens; and that the lands along Lake Erie west of Niagara and north to Michilimackinac belonged to the Ottawas, Potawatomis and Wyandots.

After the accession of American sovereignty there were further claims to territory within Royce Area 11 by the states of Connecticut and Virginia. Both these states claimed sovereignty to portions of Royce Area 11 by virtue of their colonial charters from the British Crown. Virginia relinquished its claim in 1784, attaching several conditions to its relinquishment, all of which were accepted by the Continental Congress. These conditions included guarantees that certain portions of the lands claimed by Virginia which had been previously set aside by the Virginia legislature as bounty lands for its militia be reserved for the uses [104] promised by the Virginia legislature. Connecticut relinquished part of its claim to lands in the northwest in 1786. The remainder of Connecticut's claim, which constituted what it known as the "Western Reserve", was retained by the state until 1800. The Western Reserve included more than half of northeastern Royce Area 11.

Further complicating the political question of ownership of the territory comprising Royce Area 11 were the several treaties which preceded the 1795 Treaty of Greeneville, dating back to the 1768 Treaty at Fort Stanwix. Beginning with that treaty, and including the treaties at Pittsburgh in 1775, 1776 and 1778, at Fort Stanwix in 1784, at Forts McIntosh, Finney, and Harmar, and at Canandaigua, the territory ceded for the last time at Greeneville in 1795 had been treated for several times before under varying circumstances and theories of ownership.

Thus, when the representatives of the several tribes negotiated with General Anthony Wayne at Greeneville in 1795, and agreed to cede to the United States the territory identified as Royce Area 11, a century of political and anthropological turmoil lay behind them. It is not surprising then that the events preceding the 1795 Greeneville Treaty have given rise in these proceedings before the Commission to a variety of claims, based upon a number of legal theories, and to a multitide of defenses to these claims.

[105] Several of the plaintiffs herein have urged that the aboriginal entities which they represent possessed recognized title to Royce Area 11 and the surrounding enclaves. Various arguments have been put forward by these plaintiffs in support of this proposition. The Chippewa plaintiffs in Docket 13-G, the Shawnee plaintiffs in Docket 64 and the Wyandot plaintiffs in Docket 120 argue that title to these areas was recognized in their respective aboriginal predecessors by the Treaty of Fort Stanwix, November 5, 1768, which grant was subsequently acknowledged by the Commissioners of the Virginia Colony at the Treaty of Pittsburgh, October 9, 1775; the Treaty of January 21, 1785, at Fort McIntosh; the Northwest Ordinance of 1787 (Act of July 13, 1787; reenacted August 7, 1789, 1 Stat. 50); the Treaty of January 9, 1789, 7 Stat. 28, at Fort Harmar; and the negotiations and reports of the treaty commissioners with respect to the said treaties in the consummation of the 1795 Treaty of Greeneville.

The Hannahville plaintiffs in Docket 29-C argue that the existence and validity, at the time of the 1783 Treaty of Paris, of the Ohio River boundary between white and Indian territory was accepted by the Indians and the United States; that Royce Area 11 was part of the Northwest Territory and subject to the Northwest Ordinance which declared that the Indian lands could not be taken without Indian consent or in a just war; and that the 1768 Fort Stanwix Treaty and the 1775 Treaty at Pittsburgh and the other preGreeneville treaties are of the same force and effect as the 1795 Treaty of Greeneville. In support of this proposition they cite the holding [106] of Chief Justice John Marshall in *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832), that the Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, adopted and sanctioned the treaties with the Indian tribes previous to the Constitution.

The Delwares claim recognized title by virtue of the Treaty of September 17, 1778, 7 Stat. 13.

Finally, the Miami plaintiffs in Docket 130 and the Prairie Band of Potawatomi plaintiffs in Docket 15-E urge that

> . . . the treaty itself, the conduct of United States representatives before and at the time of the treaty, the acts of government officials dealing with the Indians, and the Indians' actions too, all readily reveal that in 1795, at the Treaty of Greeneville, the United States acknowledged that the title to the lands in Ohio and eastern Indiana within Royce Area 11 was vested in the signatory Indian tribes. [*See* Brief in Docket 130, Miami Indians of Indiana, at 55.]

The standards for determining recognized or reservation title have been set forth in numerous decisions of this Commission, the Court of Claims and the Supreme Court. In the case of ***Miami Tribe* v. *United States***, **146 Ct. Cl. 421, 175 F. Supp. (1959)** (***aff'g in part, remanding in part*** Dockets 67, *et al.*, 5 Ind. Cl. Comm. 444 (1957)), the Court of Claims summarized these standards as follows:

> Where Congress has by treaty or statute conferred upon the Indians or acknowledged in the Indians the right to *permanently* occupy and use land, then the Indians have a right or title to that land which has been variously referred to in court decisions as 'treaty title', 'reservation title', 'recognized title' and 'acknowledged title.' As noted by the Commission, there exists no one particular form for such Congressional recognition or acknowledgement of a tribe's right to occupy permanently [107] land and that right may be established in a variety of ways. ***Tee-Hit-Ton* v. *United States,*** 348 U.S. 272; ***Hynes* v. *Grimes Packing Co.,*** 337 U.S. 86; ***Minnesota* v. *Hitchcock,*** 185 U.S. 373. [146 Ct. Cl. at 439.]

The various plaintiffs' arguments that their aboriginal ancestors possessed recognized title to the areas ceded at Greeneville in 1795 do not persuade us. Even assuming *arguendo* that recognized title was possible through treaties and statutes prior to the adoption of the Constitution, it is still essential for a finding of recognized title that such recognition be based upon an intent to grant permanent rights of occupancy and not mere permissive occupation.

In the case of the Northwest Territory (including Royce Area 11), it may be said initially that, beginning at least as early as the end of the American Revolution, the intent of the United States Government was unequivocally the opposite of what is required to establish recognized title. The official policy of the United States from this time until the 1795 Treaty of Greeneville was to evict the Indians from Royce Area 11. This is evidenced by the position, adopted beginning with the 1784 Treaty of Fort Stanwix, and reiterated at the Treaties of Forts McIntosh and Finney by the United States commissioners, that the Indians had lost whatever rights they might have had in Ohio by siding with the British during the Revolution. Further evidence of this intention is the enactment of the Northwest Ordinance of 1787 permitting organized settlement and civil government west of the Ohio River.

Beginning with the Fort Harmar treaties in 1789 and continuing [108] through the Treaty of Greeneville in 1795 United States policy changed to one of negotiating for the purchase of the lands west of the Ohio River from the Indians. This policy was not based upon the notion that the Indians had received any prior permanent rights to occupy these lands, but rather on the realization that the Indians were claiming aboriginal rights to these lands, and would continue to fight for these claimed rights unless the United States could persuade them to relinquish their claims for value.

It is therefore clear that whatever claims of recognized title there are before us must have arisen out of the Treaty at Fort Stanwix with the British in 1768, and those aforementioned treaties entered into at Pittsburgh in 1775, 1776 and 1778. These treaties, however, were clearly not treaties of recognition with respect to lands within Royce Area 11. The 1768 Fort Stanwix Treaty was negotiated to ward off the threat of an Indian uprising. It was negotiated almost exclusively by the Six Nations of New York, and signed only by them. Only token representatives of the Ohio tribes were present at this treaty, and the Ohio Indians, as the evidence shows, never accepted the boundary drawn at this treaty. What records there are regarding the treaties at Pittsburgh in 1775 and 1776 reveal that these were intended by the Americans to neutralize the Indians during the imminent war. The 1778 treaty with the Delawares was intended to enlist the Delawares on the American side. The territorial guarantee was intended to offset British propaganda circulating among the Indians that the Americans wanted their [109] lands. The treaty refers to Delaware "*** territorial rights *** as *** bounded by former treaties," but there were no such treaties. Finally, most of the Delawares represented at this treaty later sided with the British, thereby, under the treaty's terms, abrogating their rights thereunder. We find no intent to recognize permanent rights of occupancy of Ohio in any of these treaties.

Furthermore, the acceptance of the cession of Royce Area 11 at Greeneville in 1795 cannot be considered recognition of title in the Indians to the area ceded. *See Confederated Tribes of the Warm Springs Reservation* v. *United States,* Docket 198, 12 Ind. Cl. Comm. 664, 714-17 (1963), *aff'd in part, rev'd in part,* 177 Ct. Cl. 184, 194 (1966); *Quapaw Tribe* v. *United States,* Docket 14, 1 Ind. Cl. Comm. 469, 485-86 (1951), *rev'd on other grounds,* 128 Ct. Cl. 45 (1954). Thus we conclude that at the time of the 1795 Greeneville Treaty, the Indians did not possess recognized title to the lands west of the Ohio River.

We turn now to the question of whether the predecessors of any of the plaintiffs in these proceedings possessed aboriginal title to any or all of Royce Area 11, which title was ceded to the United States at the 1795 Treaty of Greeneville, and at the Treaty of Canandaigua and preceding treaties with the Six Nations of New York. As an incident to this question, we shall first discuss the allegation of several of the plaintiffs that the various tribes (or certain of them) who inhabited Ohio during the 18th century comprised a confederated landowning entity.

[110] This theory of confederated ownership is attractive to several of the plaintiffs for differing reasons. In the case of certain Indians, such as the aboriginal Potawatomi tribe, whose incursions into Royce Area 11 were relatively infrequent, the record herein does not support a claim based upon actual and exclusive use and occupancy. For these Indians, this theory of a confederated landowning entity would result in the determination of an interest in the overall ownership of Royce Area 11 with all the other tribes signatory to the Greeneville Treaty without the necessity of proving actual and exclusive use and occupancy of any portion of Royce Area 11. This argument is based upon the historical evidence of cooperation among the tribes within Royce Area 11 during the 18th century, and upon the 1795 Treaty of Greeneville itself, which granted consideration to all the signatory tribes in specific amounts and did not differentiate on the basis of individual tribal ownership of portions of the ceded territory. Several of the other plaintiffs, such as the Delawares and Shawnees, each of whom the evidence has established to have permanent occupants of portions of Royce Area 11, have urged the same kind of confederated land ownership theory. This is so because, although these tribes were present in substantial numbers over large portions of Royce Area 11 during the 18th century, the burden of proving exclusive use and occupancy of any territory they claim is exceedingly difficult.

[111] All of the experts who testified for the various parties in these proceedings are in basic argeement that no particular tribe ever exclusively used and occupied any large portions of Royce Area 11. The two experts for the plaintiffs, Dr. Helen Hornbeck Tanner and Mrs. Gay Ramabhushanam, were able at best to delineate areas of predominance by various tribes, but both acknowledged the uninterrupted mingling of the various tribes in their settlements and in their hunting areas during the entire period here under consideration.

The truth of the matter, as established by the evidence before the Commission, is that Ohio was, at the time Indian migration began, an immense open territory which was sufficiently large to accommodate all those Indians who settled or hunted there. At the beginning of the period of migration (about 1740) no tribe had acknowledged rights to any particular portion,[3] and this fact, coupled with the fact that the white man was the common enemy, resulted in a considerable amount of cooperation among the Indians there. When these Indians agreed among themselves to divide their interests in Ohio, as, for instance, the evidence indicates they did at the intertribal council at the mouth of the Scioto River in 1750, they were not taking any matured interests from one tribe and granting to another. Rather, they were attempting to divide a pie big enough for all, and thus there was no reason for contentiousness among them.

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[3] The Ohio Indians repudiated the political sovereignty claims of the Six Nations of New York as soon as they were sufficiently strong to do so.

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[112] Within this framework, it may be seen that Indian settlements and hunting areas prior to 1775 were very often in a state of flux primarily because the Indians themselves so chose. They moved around so much because they knew that there were other desirable territories to utilize, and that, in so doing, they were not invading the established domain of other tribes or groups. After 1775, the situation changed. They moved then under pressure from the whites, and it was at this point that the more familiar Indian-white struggles developed.

Prior to 1775, theories of confederacy must, therefore, be based primarily upon the absence of conflict among the Indians, together with certain instances of concerted action, as in the 1747 conspiracy led by the Wyandot chief, Nicholas, and Pontiac's uprising in 1763. After 1775 concerted action by the Indians developed considerably, but was motivated defensively for the protection of the interests of each tribe or group of Indians, whose interests at these times coincided. There is little else in the record to support the theories of confederated land ownership other than the absence of friction among the Indians and the cooperative defense described above. The fact that several tribes signed the treaty at Greeneville in 1795 does not support this theory, for the treaty was one of peace as well as of cession, and Wayne sought the agreement of as many tribes as possible.

At the 1795 Greeneville Treaty proceedings only Tarke, the Wyandot chief, espoused such a theory, and his reasons may well have been politically motivated to further the interests of the Wyandots, the extent of whose presence within Royce Area 11 was questionable. At Greeneville, Tarke [113] also sought apportionment by Wayne of lands on the Indian side of the Greeneville Treaty line to prevent disputes among the Indians (and, incidentally, to establish an uncontested zone for the Wyandots). Furthermore, it should be noted that the Wyandots were among the first to seek peace after Fallen Timbers, a fact that Wayne acknowledged at the Greeneville Treaty proceedings.

The claim at the Greeneville proceedings by Massas that the Ottawas, Chippewas and Potawatomis (the "Three Fires") as one entity owned a large portion of Ohio is likewise not supportable. While there was a close relationship among these Indians in their dealings in Ohio and elsewhere, there is little evidence to support the theory that these Indians ever considered themselves a confederated landowning entity. The Court of Claims and this Commission have held in the past that both the Chippewas and the Ottawas were composed of separate, autonomous bands until well into the 19th century. *See Mole Lake Band* v. *United States,* 126 Ct. Cl. 596, 598 (1953); *Red Lake Band* v. *United States,* Docket 18-E, 7 Ind. Cl. Comm. 576, 579, 607 (1959); *Ottawa Tribe* v. *United States,* Dockets 40-B, *et al.,* 2 Ind. Cl. Comm. 461, 463-64 (1953). Also, in the case of *Miami Tribe* v. *United States,* Dockets 131, *et al.,* 5 Ind. Cl. Comm. 180, 214 (1957), this Commission held that, with respect to lands on the Indian side of the Greeneville Treaty Line,

> . . . . it was understood by the Government's representatives and the Indians [at Greeneville] that each tribe had separate land, that there was no community of interest in the [114] lands of the Northwest territory. So the recognition accorded by the Greeneville Treaty [to lands on the Indian side of the Greeneville Treaty Line] was that of each tribe.

We fail to see how it is possible to reach the opposite conclusion with respect to the manner of land holding by the Indians on the other side of the Greeneville Treaty Line.

Accordingly, we hold that no part of these lands were owned by the tribes signatory to the 1795 Greeneville Treaty as a confederated landowning entity. *See Iowa Tribe* v. *United States,* 195 Ct. Cl. 365, 370 (1971) (*aff'g,* Docket 135, 22 Ind. Cl. Comm. 232 (1969)).

A further issue which must be considered before turning to the claims of aboriginal title of the respective tribal claimants is that of the political status of those Indians known as "Mingoes," who were occupying various portions of Royce Area 11 during the period here under consideration. These Mingoes were Indians of the Six Nations of New York, particularly Senecas (the westernmost of the Six Nations), who had migrated to Ohio and were located in scattered groups throughout Royce Area 11, sometimes in separate villages, often living in the villages of other tribes.

The claim in Docket 89 was brought on behalf of the Six Nations, the Seneca Nation, the Oneida Nation, the Seneca-Cayuga Tribe of Oklahoma, the Oneida Nation of New York, the Oneida Tribe of Wisconsin and the Tuscarora Nation. The Seneca-Cayuga Tribe of Oklahoma constitutes the descendants of those Mingoes who were living in Ohio in the 18th century. After leaving Royce Area 11, the Mingoes lived near the Wyandots [115] on the Sandusky River in northern Ohio, where they became known as the "Senecas of Sandusky". The last Indian signer of the Greeneville Treaty was Reyntueco, who was identified as "of the Six Nations, living at Sandusky." About 1800 these Senecas of Sandusky were joined by a portion of the Cayugas who had sold their lands in New York. One group of these Senecas of Sandusky lived with the Shawnees in Ohio but maintained its own identity. After 1831 both bands sold their lands in Ohio and moved to Kansas, and later, in 1867, to Oklahoma where the bands reunited. The plaintiff Seneca-Cayuga Tribe of Oklahoma has not, in these proceedings, alleged the independence of the Mingoes from the Six Nations of New York during the period under consideration here, nor has it asserted that the Mingoes alone aboriginally owned any of the lands in issue here. The defendant, however, has asserted that during the 18th century these Mingoes became independent bands or groups of Indians, no longer affiliated with or responsible to the Six Nations' Onondaga Council. Thus, the defendant concludes that any claims by the descendants of the Six Nations of New York to lands in Ohio cannot rest upon use and occupancy by these Mingoes.

The question is an important one because at the Treaty of Canandaigua in 1794, 7 Stat. 44, the Six Nations of New York relinquished claims to territory west of New York (including the area comprising Royce Area 11).[4] [116] Thus, if the Mingoes were at this time politically a part of the Six Nations of New York, the claims of the latter may rest upon use and occupancy by Six Nations Indians. If however, during the relevant period, these Mingoes were separate bands and groups, independent of the Six Nations of New York, the Six Nations' claim to aboriginal title of portions of Ohio will not stand, since the evidence herein is insufficient to support their claim of Indian title. In addition, any claims by the Six Nations based upon conquest of Ohio tribes in the 17th century have been historically repudiated.

Based upon the record in these proceedings, we believe that by the time of the 1794 Canandaigua Treaty, the Mingoes in Ohio were small independent bands, no longer politically subservient to tthe Six Nations of New York. To begin with, the record establishes that the majority of those Iroquois Indians living in Ohio during the 18th century were residing in villages of other tribes, particularly the Delawares and Shawnees, and often intermarried there. The Mingoes did not exclusively use and occupy any portions of Royce Area II.

Secondly, and more important, beginning shortly before 1750, the Mingoes themselves were asserting their independence of the Six Nations of New York. In 1747, Mingoes visiting Philadelphia indicated their intentions of kindling their own council fire and, by 1750, the Mingo chief, Broken Kettle, was speaking in the name of the Ohio Council. Also, in 1750, we have reports of Mingoes acting independently at the general council at the mouth of the Scioto. The Mingoes, along with most of the other Ohio Indians, sided with the French in the French and Indian War despite the urgings of the Onondaga Council. [117] At Fort Stanwix in 1768, the Six Nations of New York ignored claims by Mingoes and other Ohio Indians and acted to protect their own lands in New York. The result was that the Ohio Indians raided regularly into Pennsylvania and Virginia thereafter, again against the wishes of the Onondaga Council. From 1770 until Greeneville in 1795, the references to the Mingoes in Ohio indicate that they acted on their own in harmony with the other tribes while the Six Nations Council at Onondaga stayed out of affairs in Ohio. The fact that the Americans considered the Ohio Indians, including the Mingoes, independent of the Six Nations of New York is indicated by the refusal of the commissioners at the Fort Stanwix Treaty in 1784 to entertain the assertions of the Six Nations that they were empowered to speak for the Ohio Indians.

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[4] The Six Nations had also relinquished their western claims in prior treaties with the United States—at Fort Stanwix in 1784, 7 Stat. 15, and at Fort Harmar in January 1789, 7 Stat. 33. The 1794 Canandaigua Treaty was, however, the definitive cession of the Six Nations' Ohio claims. The 1784 Fort Stanwix Treaty was based upon the theory that the Indians had forfeited any rights to lands by siding with the British during the American revolution. The 1789 Fort Harmar Treaty was a confirmation of the 1784 Fort Stanwix Treaty boundaries but its finality was clouded by the Senate's refusal to ratify it after the Constitution went into effect on March 4, 1789.

The only conclusion which can be reached from an analysis of the activities of these Mingoes in Ohio during the 18th century is that they constituted independent bands who often acted in concert with the other Ohio Indians. Their actions do not support the conclusion that they remained politically affiliated with the Six Nations of New York.

We turn now to a consideration of the use and occupancy of Royce Area 11 during the 18th century. We have divided this large area into four separate regions for the purpose of facilitating our analysis. Each region will be discussed separately hereinafter.

We are unable to find that the predecessors of any of the tribal claimants herein possessed aboriginal title to any portion of northeastern Royce Area 11 at any time up to and including 1795. From the time that [118] the first Indian settlements appeared in and around northeastern Royce Area 11 in the early 1740's this region was the scene of a mixed population of Indians. Those Indians who, during the fifty years preceding 1795, used and occupied northeast Royce Area 11 included, at one time or another, practically all of the claimants in these proceedings with the exception of certain of the western tribes; namely Kickapoos, Kaskaskias, Weas and Piankeshaws. Beginning with the Seneca migration to the west bank of the Cuyahoga River in 1742, there are references to Delawares, Chippewas, Ottawas, Wyandots, Potawatomis and Mingoes who, at various times prior to 1795, hunted or had settlements within this region. Even Dr. Tanner who testified as an expert for several of the plaintiffs, including the Chippewas and Wyandots, is at best able to postulate mixed occupancy of northeastern Royce Area 11 by Chippewas, Ottawas, Wyandots, Delawares and Mingoes during the entire period.

The predominant characteristic of this region during the entire period under consideration was that of transient use and occupancy by the several tribes of Indians, or bands or groups of them, described above. This conclusion is amply supported in the record here by the numerous instances where Indians of these tribes were observed doing their winter hunting within this region, and by the many short-lived villages which are referred to by the experts. The fact that transient use and occupancy was the characteristic of this region is attributable to its location. It was easily accessible from both New York and Pennsylvania on the east and from the post of Detroit on the west. The pattern of use and occupancy [119] of northeastern Royce Area 11 clearly showed common use and occupancy by many tribes. There was no actual and exclusive use and occupancy by any particular tribe.

In southeastern Royce Area 11 we are presented with a substantially different situation. From the commencement of Indian settlement of Royce Area 11 in the 1740's, the portion of southeastern Royce Area 11 along the upper Muskingum River and its tributaries, particularly the Walhonding River, was a center of Delaware activity. (This region is today the area comprising the counties of Coshockton and Muskingum, Ohio.) The first recorded Delaware settlement of this area was in 1743 with the founding of White Woman's Town on the Muskingum River near the mouth of the Walhonding River. Thereafter Delaware migration continued extensively into this area. At the height of Delaware presence here, shortly before the beginning of the American Revolution, there were known to be at least seven Delaware settlements clustered around the upper Muskingum River and its tributaries. The Delawares remained in numbers here until forced to evacuate in the early 1780's due to the pressure of American military forces.

Over the period of Delaware use and occupancy of this area from 1743 tot 1781, there were other Indians present to a limited extent. There was, for a short period of time around 1750, a Wyandot town called Conchakë located near the present-day city of Coshockton. This town was settled by Nicholas' band of Wyandots, but was abandoned when the Wyandots returned to the Sandusky Bay area north of Royce Area 11 in the [120] early 1750's. From 1759 to 1774 there was a Shawnee village located on the upper Muskingum River. After 1774 these Shawnees moved to western Royce Area 11 with the rest of the Shawnees. Around 1770, Moravian Christian Indians established settlements, with the consent of the Delawares and the concurrence of the Wyandots, along the Tuscarawas River in present-day southern Tuscarawas County, a little to the east of the Delaware settlements. These Moravian Indians remained until the general exodus from the area in 1781.

Unlike the upper Muskingum River portion of southeastern Royce Area 11, the large expanse of territory along and inland from the Ohio River as far south as the mouth of the Hocking River was sparsely populated and was primarily the scene of hunting expeditions by different tribes of Indians. This area was the natural outlet for Six Nation Indians migrating westward as well as a popular hunting area for other Indians of the Six Nations who would return to New York. There is little documentation of this area, but we do have references to hunting by Iroquois and Delaware along the Ohio, and to a mixed village of Mingoes and Delawares at Cross Creek (near present-day Steubenville) on the Ohio River which was abandoned in the early 1770's.

Thus in considering the issue of aboriginal use and occupancy of southeastern Royce Area 11, we find that near the Ohio River there was mixed use and occupancy.

We do have evidence, however, which establishes Delaware use and occupancy in the region of the upper Muskingum and its tributaries during [121] the period from 1742 to 1781. Delaware presence in this area during this time was overwhelmingly predominant and lasted for a long time. Those incidents of use and occupancy by other Indians we view as permissive or as so sporadic as not to be inconsistent with Delaware use and occupancy.

When the Delawares evacuated their villages on the upper Muskingum in 1781 they did not abandon their rights to this area but, rather, were forced to leave by American military pressure. The subsequent participation by the Delawares in the warfare in Ohio against the American forces disproves any claim of voluntary abandonment or that they relinquished in any way their claims to this area before the 1795 cession at Greeneville. *See Northern Paiute Nation* v. *United States,* Docket 87, 7 Ind. Cl. Comm. 322, 419 (1959).

Based upon the evidence in this record, we conclude that as of the date of the 1795 Treaty of Greeneville, the

Delaware Indians possessed aboriginal title to that portion of Royce Area 11 included within the present-day counties of Tuscarawas, Coshockton and Muskingum in Ohio. Any expansion of these boundaries cannot be supported by the evidence herein.

In the central region of Royce Area 11, Shawnees established a settlement at the mouth of the Scioto on the Ohio River in the late 1730's. During its existence this settlement remained predominantly a Shawnee town, but it was also occupied by Mingoes. In the years that followed, Shawnee use and occupancy of this area expanded northward, culminating in 1758 with the voluntary abandonment of the settlement at [122] the mouth of the Scioto and the movement of their main settlement to the Pickaway Plains area on the middle Scioto River near present-day Circleville. By the time of Lord Dunmore's expedition against the Shawnees in 1774, there were several Shawnee settlements existing along the middle Scioto. However by the late 1770's, the Shawnees had fled westward where they established settlements on the Great Miami River.

Other tribes occupied and used various portions of central Royce Area 11 during the 18th century. There were a few Delaware settlements along the middle Scioto during the late 1740's and early 1750's, but shortly thereafter it appears that the Delawares voluntarily abandoned all of these except a village on the upper Hocking River. We also know that there were Mingoes living in many of the Shawnee settlements and that there was a Mingo town, under the chief Pluggy, on the headwaters of the Scioto from 1775 through the early 1780's. Hunting by several tribes also took place throughout the period under consideration in its northern and southern portions where there were few settlements. The evidence indicates that the southern portion (near the Ohio River) was a region of mixed use by hunters of various tribes. In the extreme northern portion, there are reports of extensive hunting by Wyandots who lived north of Royce Area 11, but other tribes hunted there as well.

The Shawnees continuously used and occupied this area from the late 1730's until they were forced to abandon these lands in the late 1770's. [123] Large portions of central region, however, were common hunting grounds. This was true of the entire southern third of this region bordering on the Ohio River. The same was true of the norther quarter of this region. Until they were forced out in the late 1770's, the Shawnees had established Indian title to the area bounded on the north by an east-west line running along the 40th degree north latitude and on the south by a straight line running from the city of Athens in Athens County west to the town of Highland in northern Highland County, and bounded on the east and west by the lines described in note 6 of the findings of fact as the east and west boundaries of central Royce Area 11. The presence of Mingoes and Delawares within this territory was permissive. Furthermore, we conclude that evacuation by the Shawnees of this region was the direct result of American military pressure and was, therefore, not voluntary. The Shawnees, as evidenced by their involvement in the warfare in Ohio throughout the period up to the Battle of Fallen Timbers, did not relinquish their claims to this region until the Treaty of Greeneville in 1795.

The United States has claimed that the portion of central Royce Area 11 west of the Scioto River, being part of the Virginia Military District, never became public domain and, therefore, that the United States cannot be held liable with respect thereo. Virginia's claims west of the Ohio River were relinquished to the Confederation in 1784, subject to several conditions, one of which was that the lands between the Scioto [124] and the Little Miami Rivers should be reserved for Virginia troops, as had previously been promised by the Virginia legislature. Up to the time in 1784 when Virginia relinquished its claims in the Northwest Territory, Virginia owned the Virginia Military District and possessed the exclusive right of preemption over the existing Indian rights of

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occupancy thereto. With the relinquishment, title to the soil passed to the United States, as did the exclusive right of preemption. The reservation did not affect the passing of title or the right of preemption. The titles of both Virginia and the United States were subject to Indian rights of occupancy, which were not relinquished until the 1795 Treaty of Greeneville, when the Indians relinquished their rights to the United States. Under these circumstances, the United States could be liable to the Indians with respect to lands located within the Virginia Military District. *See Johnson & Graham's Lessee* v. *M'Intosh,* 21 U.S. (8 Wheat.) 543, 586 (1823). *See also Lipan Apache Tribe* v. *United States,* 180 Ct. Cl. 487, 498 (1967) (*rev'g* Docket 22-C, 15 Ind. Cl. Comm. 532 (1965)).

Western Royce Area 11 presents, again, a problem somewhat different from those of the other regions described above. Groups of Miamis settled at two places within this region in the late 1740's, but they evacuated after a French-led Ottawa attack in 1752. Miamis are known to have hunted here through the years up to the 1795 Greeneville Treaty, but throughout the 18th century the main area of Miami use and occupancy was northwest of Royce Area 11, centering around present-day Fort Wayne.

[125] Shawnees are also known to have hunted extensively in western Royce Area 11. Furthermore, the Shawnees, beginning in 1773, moved their settlements west from the Pickaway Plains, and in the early 1780's there are reports indicating the existence of as many as sixteen Shawnee villages on the upper Great Miami River and its tributary, the Mad River. In the area nearer the Ohio River, just as in the other similarly situated regions of Royce Area 11, there was mixed hunting.

The Miami plaintiffs contend that despite the absence of evidence we should find by inference that the aboriginal Miami Tribe owned the territory comprising western Royce Area 11 by virtue of exclusive use and occupancy.

Indian title is, however, a question of fact and, absent evidence, we are unable so to find. *See Quapaw Tribe* v. *United States,* 1 Ind. Cl. Comm. 469, 481-83 (1951), *rev'd on other grounds,* 128 Ct. Cl. 45 (1954). The period of use and occupancy by the Shawnees of western Royce Area 11 was not sufficiently long to establish aboriginal title.

We next turn to a consideration of the remaining areas ceded to the United States at the 1795 Greeneville Treaty; namely, the sixteen enclaves described in the second paragraph of Article III, the rights of passage over the five routes described in the last paragraph of Article III, and the separate tracts described in the first paragraph of Article IV, which were excepted from the general relinquishment made [126] by the United States of lands north and west of the Greeneville Treaty line.[5]

Our findings of fact set forth the history of each of these areas and our conclusions regarding evidence of Indian use and occupancy and aboriginal title thereof. With regard to Royce Areas 12, 13 and 14 in Ohio, and the portions of the first and second described passages running between these areas, all of which are located close to the Greeneville Treaty Line, we have found nothing in the record to warrant treating these areas as other than appendages to nearby portions of Royce Area 11. These areas, as with said portions of Royce Area 11, were not aboriginally owned by any tribe at the time of the 1795 Greeneville Treaty. Furthermore, nothing in the record herein supports a finding of aboriginal title to Royce Area 15 in Ohio in any tribe.

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[5] We have entered no findings relating to the lands described in the third clause of the first paragraph of Article IV as follows:

> 3d. The lands at all other places in possession of the French people and other white settlers among them, of which the Indian title has been extinguished as mentioned in the 3d article.

These lands are impossible to define. They are not at issue in these proceedings.

Royce Areas 16 and 17, and that portion of the fifth described passage running from Royce Area 16 to the Wabash River, are located within the general region of Miami use and occupancy during the 18th century. The evidence supports the conclusion that these areas were aboriginally owned by the Miami Tribe by virtue of their continuous and exclusive use and occupancy from the beginning of the 18th century until the time of the 1795 Greeneville Treaty. Abandonment of these areas shortly before the [127] Greeneville Treaty in 1795 was accomplished under the threat of American military presence and was not a relinquishment of the Miami claims. *See Northern Paiute Nation* v. *United States, supra.* The area discussed in our finding of fact No. 22, *infra,* described in the 1795 Greeneville Treaty as located ". . . at the Ouatonon or Old Wea towns on the Wabash river", is located within the area the Commission has previously held was within the aboriginal area of the Wea Nation which, at the time of the 1795 Treaty of Greeneville, was a part of the Miami Tribe. *See Miami Tribe* v. *United States,* Docket 67, 2 Ind. Cl. Comm. 617, 629 (1954), *aff'd in part, rev'd in part,* 146 Ct. Cl. 421 (1959). This area was subsequently returned to the Indians and most of it was later receded as part of Royce Area 99, for which the Wea Nation has already been compensated. *See Peoria Tribe* v. *United States,* Docket 314, 9 Ind. Cl. Comm. 274 (1961). The small portion north of the Wabash River is included in the claim of the Peoria Tribe on behalf of the Wea Nation for Royce Area 98 in Docket 314-A before the Commission. *See Pottawatomie Tribe* v. *United States,* Dockets 15-D, et al., 30 Ind. Cl. Comm. 42 (1973).

Bands of Ottawas (known as the Ottawas of the Maumee, Blanchard's Fork, AuGlaize and Roche de Boeuf) moved into Royce Areas 18 and 19 in Ohio immediately after Pontiac's unsuccessful uprising against the British in 1763. The evidence establishes that this region was used and occupied continuously by these Ottawas from 1763 until well into the 19th century. The evidence supports our finding that, in 1795, these bands of Ottawas possessed aboriginal title to these areas.

The unsurveyed area around Fort Sandusky on Lake Erie and Royce Area 20 had been used and occupied by the Wyandots for a long time prior [128] to the 1795 Treaty of Greeneville. The evidence establishes that the Wyandots first moved into these areas from Detroit in the late 1730's and remained there, almost continuously, until the time of the 1795 Greeneville Treaty. On the basis of the evidence, we have found that the Wyandot Tribe possessed aboriginal title to these areas in 1795. The fact that the area of Fort Sandusky was within Connecticut's Western Reserve does not affect the fact that the Wyandots held aboriginal title to this area, which they ceded to the United States in 1795. *See Lipan Apache Tribe* v. *United States, supra.*

With regard to the Detroit area, the evidence shows that the only Indians residing in 1795 within the area ceded at the Greeneville Treaty were the Wyandots who had two settlements there, at present Wyandotte and Gibraltar, Michigan, which they had occupied since 1777, the year following the accession of United States sovereignty. *See Red Lake Band* v. *United States, supra,* at 580. Most of the Detrtoit area was, by 1795, occupied by white settlers. The evidence demonstrates that the other tribes who formerly had settlements at Detroit voluntarily abandoned them well before 1795. The Wyandots, on the other hand, had apparently abandoned the Detroit cession area in the early 1740's for the Ontario side of the Detroit River, and had not returned until 1777. Use and occupancy of the two villages beginning after the accession of United States sovereignty, plus the fact that these Indians were there for only the [129] relatively short period of eighteen years before the 1795 Greeneville Treaty, do not support a claim of aboriginal title against the United States.

The history of the areas located at the Straits of Mackinac (Royce Areas 21, 22 and 23, Michigan) which were ceded at Greeneville in 1795, establishes that in 1795 they were areas of common use and occupancy by autonomous bands of Chippewas and Ottawas represented in these proceedings by the plaintiffs in Dockets 18-M and 40-F. These plaintiffs have acknowledged such use in their Joint Brief and Requested Findings (Requested Finding 5). Such common use and occupancy precludes a finding of aboriginal title. *See Iowa Tribe* v. *United States*, Docket 135, 22 Ind. Cl. Comm. 232, 279 (1969), *aff'd*, 195 Ct. Cl. 365 (1971).

Chicago (Royce Area 24, Illinois) and that portion of the fourth described passage running from Chicago to the Illinois River we have found to have been aboriginally owned in 1795 by the Potawatomi Tribe; the same is true of those portions of the areas ceded at the 1795 Greeneville Treaty located on the north and west banks of the Illinois River. The areas on the south and east banks of the Illinois River ceded at Greeneville in 1795 we have found to have been aboriginally owned by the Kickapoo Tribe. We believe that our findings of fact Nos. 28 and 29, *infra*, support these conclusions.

There are two legal considerations worthy of discussion in connection with our finding that some of the claimants here have established that their predecessors possessed aboriginal title to any portion of Royce Area 25 (Clark's Grant) at the time of the 1795 Greeneville Treaty. The first is the defendant's contention that the United States cannot [130] be held liable for these lands because, under the condition in Virginia's 1784 deed of cession of claims in Ohio setting these lands aside as bounty lands for Clark's regiment, they passed directly to individuals and were never a part of the public domain. On these same grounds, the defendant asserts that no tribes could have possessed aboriginal title to any of Clark's Grant in 1795. We do not agree with these arguments for the same reasons we have set forth earlier in this opinion in our discussion of the Virginia Military District. Dictum, cited by the defendant, of the Supreme Court of Judicature of Indiana in the case of *Henthorn* v. *Doe, on the Demise of Shepherd*, Corydon, May Term, 1822 Def. Ex. S-33, Docket 13-G, *et al.*) we find inapposite. This case involved rights to land as between white grantees and did not discuss the possibility of the existence of aboriginal title.[6]

[131] The second and controlling consideration involves the determination of what tribes, if any, may have used and occupied the lands encompassing Clark's Grant for a long time prior to the 1795 Greeneville Treaty. The plaintiffs base their claims on certain prior Commission determinations in other cases involving lands adjacent to Royce Area 25. The plaintiffs cite the Commission's prior determination, in *Peoria Tribe of Indians* v. *United States*, Docket 289, 19 Ind. Cl. Comm. 107, 117 (1968), that by virtue of the 1795 Greeneville Treaty (together with certain follow-up treaties) the United States recognized the joint title of the Delaware and Piankeshaw

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[6] We believe that a more accurate analysis of intrawhite claims to lands within Clark's Grant is set forth in the opinion of Chief Justice Marshall in the case of *Hughes* v. *Trustees of the Town of Clarksville*, 31 U.S. (6 Pet.) 369, 379 (1832), in the following language:

> That plaintiff in error contends that as the State of Virginia had conveyed all her territory north-west of the River Ohio to the United States before any legal title was vested in the commissioners or trustees appointed by the Act of 1783, the title at law was vested in the United States, and could pass only from them. That the reservation in favor of Clark's regiment is not an exception of so much land from the deed of cession; but a stipulation that Congress shall comply with the promise made by Virginia to that regiment. Consequently, that the plaintiffs in ejectment had no legal title.
>
> Had the court been required to expound these laws immediately after the deed of cession was executed, it is probable that the construction made by the plaintiff in error would have been adopted. But the opposite construction has prevailed, and all the titles depend on it. It is too late to controvert.

Indians to Royce Area 49, which adjoins Royce Area 25 on the southwest. Plaintiffs also cite the Commission's prior determinations in *Miami Tribe* v. *United States,* Dockets 67 *et al.,* 2 Ind. Cl. Comm. 617, 629-31 (1954), *aff'd in part, rev'd in part,* 146 Ct. Cl. 421 (1959), and *Miami Tribe* v. *United States,* Dockets 253 *et al.,* 5 Ind. Cl. Comm. 180, 192-95 (1957), that by the Treaty of August 18, 1804, 7 Stat. 81, the United States agreed to acknowledge the title of the Delaware to Royce Area 56, which adjoins Royce Area 25 on the north, east and west; that by the Grouseland Treaty of August 21, 1805, 7 Stat. 91, the Delawares relinquished their claim to Royce Area 56 in favor of the Miami, and the United States confirmed the 1795 Greeneville Treaty recognition of title to Royce Area 56 in the Miami, Eel River Miami and Wea; and that subsequently, by the Treaty of September 30, 1809, 7 Stat. 113, the Miamis acknowledged that the Delawares had equal rights with them to the country watered by the White River, north of Royce Area 56.

[132] On the basis of these prior determinations of the Commission the plaintiffs conclude that, since it is not possible to draw lines of division among the Miamis, Eel River Miamis, Weas, Piankeshaws and Delawares, who possessed Clark's Grant as of the time of the 1795 Greeneville Treaty, it should be determined that these tribes had equal interests in Clark's Grant; i.e., a two-fifths interest in the Miami tribes represented in Dockets 130 and 252, a two-fifths interest in the Wea and Piankeshaw nations represented by the Peoria Tribe of Oklahoma in Docket 338, and one-fifth interest in the Delaware Tribe represented in Dockets 27-B and 338.

The evidence of aboriginal use and occupancy of Royce Area 25 is sparse. The defendant has introduced no evidence relating to such use and occupancy, relying on the arguments described above. The prior determinations of the Commission cited and relied upon by the plaintiffs are, except for a few broad findings relating to longtime use and occupancy of the general area of southern Indiana,

useful only in determining use and occupancy of the area surrounding Royce Area 25 shortly before and after the 1795 Greeneville Treaty. This is so because all those cases cited involved the determination of those tribes in whom title to said surrounding areas was recognized by the 1795 Greeneville Treaty, as identified and described in certain later treaties.

We have diligently studied the available source material, including the prior determinations of this Commission, and, on the basis of our analysis, are unable to find evidence to support a claim of aboriginal [133] title to any portion of Clark's Grant at the time of the 1795 Greeneville Treaty by any of the claimants herein.

We have found that no tribes possessed aboriginal title to Royce Area 26 (the Vincennes Tract) at the time of the 1795 Greeneville Treaty. The evidence cited in our finding of fact No. 32, *infra,* supports the conclusion that the Indians at the 1795 Greeneville Treaty and at the Treaty of Fort Wayne of June 7, 1803, 7 Stat. 74, acknowledged that Indian title to the tract described in the first article of the Fort Wayne treaty had been extinguished prior to the 1795 Treaty of Greeneville. The Commission, in *Peoria Tribe* v. *United States,* Docket 289, 19 Ind. Cl. Comm. 107, 121-22 (1968), found as follows with respect to the effect of the Greeneville and Fort Wayne Treaties:

> The Commission therefore finds that both the Delaware and Piankeshaw tribes duly participated in the 1795 Greeneville Treaty, the consequence being, that tribal ownership of lands then used and occupied by them was recognized by the United States. We find and conclude further that the Fort Wayne Treaty of June 7, 1803 (7 Stat. 73) [sic], the Delaware and Piankeshaw treaties of cession of August 8, 1804 (7 Stat. 81) and August 27, 1804 (7 Stat. 83), and the Grouseland [sic] Treaty of August 21, 1805, determined and confirmed the boundaries and ownership of the lands previously recognized as belonging to the Delaware and Piankeshaw tribes under the 1795 Greeneville Treaty.

The position of this Commission and of the Court of Claims has consistently been that the boundaries of lands, title to which the United States recognized at Greeneville, were identified in the several subsequent treaties with the Indians. *See Miami Tribe* v. *United States, supra*, at 442. Thus in the *Peoria* case, *supra,* title to the areas surrounding [134] the territory defined in the Fort Wayne treaty as the Vincennes Tract was identified as recognized in the appropriate tribes present at Greeneville in 1795. As a necessary corollary to this, the boundaries of the Vincennes Tract described in the Fort Wayne treaty, and agreed to by the Indians therein, constituted an acknowledgment by the Indians that the Vincennes reservation to which the Indians agreed at Greeneville they then possessed no title, consisted of the area described in the first article of the Fort Wayne treaty. *See Peoria Tribe* v. *United States,* Dockets 99, *et al.,* 16 Ind. Cl. Comm. 574, 582 (1966). We therefore conclude that evidence of Indian use and occupancy of the Vincenenes tract is immaterial.

Our finding of fact with respect to Royce Area 27, Illinois (Fort Massac) needs little comment. The facts set forth therein lead to our conclusion that at the time of the 1795 Greeneville Treaty, this area was aboriginally owned by the Kaskaskia Indians, who are now a constituent part of the Peoria Tribe of Indians of Oklahoma, plaintiffs in Docket 338.

One more point should be made in this opinion in connection with our analysis of the ownership of certain of the enclaves ceded to the United States under the 1795 Greeneville Treaty. We have recently held in the cases of *James Strong* v. *United States,* Dockets 13-E, *et al.,* 30 Ind. Cl. Comm. 6 (1973) and *James Strong* v. *United States,* Dockets 13-F, *et al.,* 30 Ind. Cl. Comm. 337 (1973) that the areas adjoining certain of the 1795 Greeneville Treaty enclaves were jointly owned under recognized title by more than one [135] Indian entity. We do not believe that our conclusions in the above-cited cases regarding recognized title interests in the areas adjoining these enclaves are inconsistent with the conclusions herein as to aboriginal ownership of the enclaves in 1795. These enclaves were very small areas where use and occupancy was easily observable and definable. In addition, they were strategic locations familiar to white observers who recorded their observations. The evidence in the instant case showed that, as to these particular small areas, certain groups held aboriginal title. However, in dealing in the above-cited cases with the division of recognized title interests to much larger areas, the evidence did not warrant any division of particular tribal interests on the basis of geographical boundaries within said areas.

In summary, the Commission has reached the following conclusions with respect to the lands ceded by the tribes signatory to the 1795 Treaty of Greeneville, title to which is at issue in these proceedings:

1. As of 1795, the Delaware Tribe, represented in these proceedings by the Delaware Tribe of Indians in Docket 27-B and the Absentee Delaware Tribe of Oklahoma, *et al.,* in Docket 338, possessed aboriginal title to that portion of Royce Area 11 included within the present-day counties of Tuscarawas, Coshockton and Muskingum, in southeastern Ohio.

2. As of 1795, the Shawnee Tribe, represented in these proceedings by the Shawnee Tribe of Indians of Oklahoma, *et al.,* in Docket 64 and the Eastern Shawnee Tribe of Oklahoma, *et al.,* in Dockets 335 and 338, [136] possessed aboriginal title to that portion of Royce Area 11 circumscribed by a line beginning at the town of Highland in northern Highland County, Ohio, thence easterly in a straight line to the city of Athens in Athens County, Ohio, thence in a northwesterly direction up the Hocking River to the town of Lancaster, thence northeasterly in a straight line to a point on the South Fork of the Licking River, 4½

miles southwest of the city of Newark in Licking County, Ohio, thence west on the 40th degree north latitude to a point one mile east of the town of Catawba in northeastern Clark County, Ohio, thence in a straight line south to the place of beginning.

3. As of 1795, the Miami Tribe possessed aboriginal title to Royce Areas 16 and 17 in Indiana and to that portion of the fifth "passage" that is described in the last paragraph of Article III of the 1795 Treaty of Greeneville running from Royce Area 16 west to the Wabash River over a distance of approximately two miles. The Miami Tribe is represented in these proceedings by Ira Sylvester Godfroy, *et al.*, *ex rel.*, The Miami Indian Tribe, plaintiffs in Docket 130, and the Miami Tribe of Oklahoma, *et al.*, plaintiffs in Docket 252. The Weas, who were a part of the Miami Tribe in 1795, are represented here by the Peoria Tribe of Indians of Oklahoma, *et al.*, plaintiffs in Docket 338.

[137] 4. As of 1795, the bands or groups of Ottawa Indians known as the Ottawas of the Maumee, Blanchard's Fork, AuGlaize and Roche de Boeuf, represented in these proceedings by the Ottawa Tribe of Oklahoma, *et al.*, plaintiffs in Docket 338, possessed aboriginal title to Royce Areas 18 and 19 in Ohio.

5. As of 1795, the Wyandot Tribe, represented in these proceedings by Lawrence Zane, *et al.*, *ex rel.*, Wyandot Tribe, *et al.*, plaintiffs in Docket 120, possessed aboriginal title to the unsurveyed area near Sandusky, Ohio, delineated by a dotted black line on Royce's Map of Ohio (Fort Sandusky) and to Royce Area 20 in Ohio.

6. As of 1795, the Potawatomi Tribe, represented in these proceedings by The Pottawatomie Tribe of Indians, The Prairie Band of the Pottawatomie Tribe of Indians, *et al.*, plaintiffs in Docket 15-E, the Hannahville Indian Community, *et al.*, plaintiffs in Docket 29-C, and the Citizen Band of Potawatomi Indians of Oklahoma, *et al.*, plaintiffs in Docket 338, possessed aboriginal title to Royce Area 24 (Chicago) in Illinois, to those portions of the areas described in the fifteenth and sixteenth clauses of the second paragraph of Article III of the 1795 Treaty of Greeneville (the mouth of the Illinois River and the "old Piorias fort and village") located north and west of the Illinois River, and to that portion of the fourth "passage" that is described in the last paragraph of Article III of the 1795 Treaty of Greeneville running, for a distance of approximately seven miles, from Royce Area 24 to the Illinois River.

[138] 7. As of 1795, the Kickapoo Tribe, represented in these proceedings by The Kickapoo Tribe of Oklahoma, The Kickapoo Tribe of Kansas, *et al.*, plaintiffs in Docket 338, possessed aboriginal title to those portions of the areas described in the fifteenth and sixteenth clauses of the second paragraph of Article III of the 1795 Treaty of Greeneville (the mouth of the Illinois River and the "old Piorias fort and village") located south and east of the Illinois River.

7. As of 1795, the Kaskaskia Tribe, represented in these proceedings by the Peoria Tribe of Indians of Oklahoma, *et al.*, plaintiffs in Docket 338, possessed aboriginal title to Royce Area 37 (Fort Massac) in Illinois.

9. None of the predecessors of any of the plaintiffs in these consolidated proceedings aboriginally owned any other portions of the territory ceded to the United States by the Six Nations at Canandaigua in 1794 and by the tribes signatory to the 1795 Treaty of Greeneville, nor did any of such predecessors possess recognized title to any of said territory.

Therefore, on the basis of this opinion and the accompanying findings of fact, the Commission will, this day, issue an order that the claims in Dockets 13-G, 18-M, 40-F and 89 be dismissed, and that the claims under the remaining dockets in these consolidated proceedings proceed to a determination of the acerage and fair market value, as of August 3, 1795, of the lands found herein to have been aboriginally owned by the [139] predecessors of the various plaintiffs and to a determination of the consideration paid by the United States at the 1795 Greeneville Treaty.

/s/ Margaret H. Pierce, Commissioner

We Concur:

/s/ John T. Vance, Commissioner
/s/ Richard W. Yarborough, Commissioner

[140] Kuykendall, Chairman, and Blue, Commissioner, concurring:

We concur, but point out that in our opinion the "Potawatomi Tribe" consisted of politically autonomous land-owning bands during the relevant treaty making periods described *ante*. *See* the dissenting opinion in ***Citizen Band*** v. *United States*, Dockets 71, *et al.*, 27 Ind. Cl. Comm. 187, 328 (1972). Since, however, we are bound by the majority's opinion in this above cited case, we concur herein.

/s/ Jerome K. Kuykendall, Chairman
/s/ Brantley Blue, Commissioner

[141]

BEFORE THE INDIAN CLAIMS COMMISSION

(Caption omitted)

[142] Decided: August 9, 1973

FINDINGS OF FACT

The Commission makes the following findings of fact:

1. *Parties.*

(a) The plaintiffs in Docket 13-G, James Strong, Elmer B. Simonds, William Robert Warren, Margaret Arvold, Julia Potter, Betty Ann Nordwall, Stanley A. Nordwall and Edwin Carl Lerke, Jr., have brought claims for certain portions of Royce Area 11 and certain of the other tracts ceded at Greeneville ". . . as the representatives and on behalf of the descendants of the members of the Chippewa Nation or Tribe of Indians, including all members by blood of the Chippewa Tribe of Indians, particularly those entitled to share in any recovery had in this action." (*See* Petition in Docket 13-G, page 2.) The petition in Docket 13-G was filed pursuant to the Commission's order of July 13, 1949, wherein the claims in the original Docket 13 brought by the "Saginaw Chippewa Indian Tribe of Michigan, a Federal Corporation, and James Strong, William Robert Warren, Margaret Arvold, Julia Potter, Stanlay A. Nordwall, Betty Ann Nordwall, Edwin Carl Lerke, Jr., and Elmer B. Simonds, *et al.*. as representatives of all members by blood [143] of the Chippewa Tribe of Indians" were ordered severed and refiled as separate claims. The Court of Claims and this Commission have previously held that the Chippewas were separate bands or groups. *See Mole Lake Band* v. *United States*, 126 Ct. Cl. 596, 598 (1953); *Red Lake Band* v. *United States*, Dockets 18-E, *et al.*, 7 Ind. Cl. Comm. 576, 579, 607 (1959). However, we have also held that Saginaw Chippewa bands participated in the Greeneville Treaty and were entitled to and received the benefits accorded the participating Indians to that treaty. *See Saginaw Chippewa Indian Tribe* v. *United States*, Docket 57, 22 Ind. Cl. Comm. 504, 522 (1970). We find that the plaintiffs in Docket 13-G, James Strong, *et al.*, are authorized to bring this claim on behalf of and as representatives of the descendants of those Chippewas who participated in the 1795 Greeneville Treaty.

The Chippewa plaintiffs in Docket 18-M, the Red Lake Band, *et al.*, including the Bay Mills Indian Community, have asserted claims to Royce Areas 21, 22 and 23 in Michigan which were ceded at Greeneville in 1795. It has previously been determined, in ***Red Lake Band* v. *United States, supra,*** at 608-09, that these plaintiffs have the capacity to prosecute actions on behalf of the Chippewa Indians who resided in northern Michigan, and that Chippewas from these areas participated at Greeneville.

(b) The Citizen Band of Potawatomi Indians, in Docket 338, asserts a claim for Royce Area 24 (Chicago) and two other areas in Illinois, [144] all of which were ceded at Greeneville in 1795. The Hannahville Indian Community in Docket 29-C and the Prairie Band of the Pottawatomie Tribe of Indians in Docket 15-E have asserted claims for additional compensation for the cession of Royce Area 11 and certain other areas relinquished at the Treaty of Greeneville. These plaintiffs are authorized to bring suits as representatives and on behalf of the Potawatomi Tribe. *See Citizen Band* v. *United States,* Dockets 71, *et al.,* 27 Ind. Cl. Comm. 187, 323-24 (1972).

(c) The Delaware Tribe of Indians in Docket 27-B and the Absentee Delaware Tribe of Oklahoma in Docket 338 have jointly asserted claims for additional compensation for Area 11 and various other areas relinquished at Greeneville in 1795. The right of these groups to sue in a representative capacity has heretofore been established before this Commission. *See Delaware Tribe* v. *United States,* Dockets 27-A and 241, 2 Ind. Cl. Comm. 536, 537 (1954).

(d) Two groups of Ottawa plaintiffs have filed claims. Robert Dominic, *et al.*, on behalf of the Ottawa Tribe of Indians, have asserted claims in Docket 40-F to Royce Areas 21, 22 and 23 in Michigan. The Ottawa Tribe of

Oklahoma in Docket 338 seeks additional compensation for Area 11 and certain other areas relinquished at Greeneville in 1795. The Commission has previously held that aboriginally the Ottawas were separate and independent tribes, bands, or groups, wholly autonomous in their political actions and other movements, that the plaintiffs in Docket 40-F have the capacity to prosecute actions in a representative capacity on behalf of those Ottawa Indians who resided in northern [145] Michigan and were present at Greeneville, and that the Ottawa plaintiffs in Docket 338 are the descendants of those Ottawas from the Maumee River region who participated in the 1795 Greeneville Treaty. *See Ottawa Tribe* v. *United States,* Dockets 40-B, *et al.,* 2 Ind. Cl. Comm. 461, 463-68 (1953); ***Red Lake Band* v. *United States, supra,*** at 587.

(e) Claims for additional compensation for Royce Area 11 and certain of the other areas ceded at Greeneville in 1795 have been asserted by three groups of Shawnee plaintiffs. The claims in Dockets 335 and 338 have been brought by the Eastern Shawnee Tribe of Oklahoma and the Absentee Shawnee Tribe of Oklahoma. It has been determined that these groups have the right to sue in a representative capacity before this Commission. *See Absentee Shawnee Tribe* v. *United States,* Docket 334, 6 Ind. Cl. Comm. 377, 397 (1958), *aff'd as modified,* 151 Ct. Cl. 700 (1960), *cert. denied,* 366 U.S. 924 (1961). The individual plaintiffs in Docket 64 have, by the Commission's order of October 22, 1969, been deemed authorized to bring suits in a representative capacity on behalf of all members of the Shawnee Tribe of Indians of Oklahoma.

(f) The complaint in Docket 89, claiming additional compensation for portions of Royce Area 11, arising out of certain treaties prior to the 1795 Treaty of Greeneville, was filed on behalf of the Six Nations, the Seneca Nation, the Oneida Nation, the Seneca-Cayuga Tribe of Oklahoma, the Oneida Nation of New York, the Oneida Tribe of Wisconsin, and the Tuscarora Nation. All of these tribes are entitled to sue in a representative capacity under the Indian Claims Commission Act. *See Six Nations*

v. *United States,* Dockets 84 and 300-B, 23 Ind. Cl. Comm. 376, 389 (1970).

(g) The plaintiffs in Docket 120, Lawrence Zane, Leonard N. Cotter and Ruth Walters, are individual members by blood of the Wyandot Tribe and the Wyandot Tribe of Oklahoma, incorporated pursuant to Section 3 of the Oklahoma Indian Welfare Act of June 26, 1936 (49 Okla. Stat. 1967). These individuals are authorized to bring this claim in a representative capacity on behalf of all members of said Wyandot Tribe and Wyandot Tribe of Oklahoma.

(h) There are two groups of Miami plaintiffs, those who filed in Docket 252 and those who filed in Docket 130. Both groups assert claims to Royce Area 11 and other areas relinquished at Greeneville in 1795. The plaintiff in Docket 252 is the Miami Tribe of Oklahoma which has been found entitled to sue in a representative capacity before the Indian Claims Commission. *See Miami Tribe* v. *United States,* Docket 253, 5 Ind. Cl. Comm. 180, 181 (1957). The plaintiffs in Docket 130 are individuals, the descendants of Miami Indians who either remained in Indiana when the rest of the tribe moved to Kansas or moved west and subsequently returned to Indiana. They are suing in a representative capacity on behalf of all Miami Indians. Their right to do so with respect to the claims accruing before the division of the tribe was also recognized in the above-cited case.

[147] (i) The Peoria Tribe of Oklahoma originated in a merger of the Kaskaskia, Wea, Peoria and Piankeshaw Tribes in 1854. This Commission has determined that the Peoria Tribe may file claims on behalf of its constituent tribes on causes of action accruing before the merger. *See Peoria Tribe* v. *United States,* Dockets 65, *et al.,* 4 Ind. Cl. Comm. 223, 238 (1956), *aff'd,* 169 Ct. Cl. 1009 (1965). The Peoria Tribe has filed several claims in Docket 338 on behalf of its respective constituent tribes for additional compensation for areas other than Royce Area 11 ceded at Greeneville in 1795. It has also asserted a claim to recover one-third of any award in this case to the Miami plaintiffs on the ground that certain of the Peoria Tribe's constituent tribes were a part of the Miami Tribe in 1795.

(j) The Kickapoo Tribe of Kansas and the Kickapoo Tribe of Oklahoma, both organized tribes and plaintiffs in Docket 338, have been found entitled to sue on the claims of the Kickapoo Indians. *See Kickapoo Tribe* v. *United States,* Docket 317, 10 Ind. Cl. Comm. 271, 281 (1962), *aff'd,* 174 Ct. Cl. 550 (1966). These plaintiffs have asserted claims in these proceedings based upon interests in certain of the areas, other than Royce Area 11, ceded at Greeneville in 1795.

2. *Bases of Claims.* Royce Area 11 and the other tracts, which will be separately delineated below, were relinquished under the Treaty of Greeneville of August 3, 1975, 7 Stat. 49,, between the United States and the following-named tribes: Wyandots, Delawares, Shawnees, Ottawas, Chippewas, Potawatomis, Miamis, Eel-Rivers, Weas, Kickapoos, Piankeshaws, [148] and Kaskaskias. The Greeneville Treaty, by its terms, superseded earlier treaties made with certain of these same tribes. The Six Nation Iroquois, a confederacy comprising the Seneca, Cayuga, Oneida, Onondaga, Mohawk, and Tuscarora Nations, relinquished claims to territory west of New York (including the area comprising Royce Area 11) by the treaties of October 22, 1784, 7 Stat. 15, at Fort Stanwix; January 9, 1789, 7 Stat. 33, at Fort Harmar; and November 11, 1794, 7 Stat. 44, at Canandaigua.

3. *Description of Greeneville Cessions.* In Article III of the Treaty of Greeneville, 7 Stat. 49-51, a general boundary line was drawn between the lands agreed to be owned by the United States and the lands agreed to be owned by the Indian signatories. This line, generally referred to as the Greeneville Treaty Line, began at the mouth of the Cuyahoga River on Lake Erie at a point where Cleveland is now located. From the mouth of the Cuyahoga the line ran south about 70 miles to Fort Lawrence, Ohio, thence west across the center part of the

state to the Indiana border at Fort Recovery on a branch of the Wabash River. The line then went southwest at a slight angle to a point on the Ohio River about 25 miles west of the Ohio state line. The lands south and east of this line were ceded and relinquished to the United States. This ceded area is identified on Royce's Map of Ohio and Indiana as Area 11.

Also ceded to the United States in Article III of the Greeneville Treaty were a series of small, strategically located areas (generally [149] referred to as "enclaves") on the Indian side of the Greeneville Treaty Line. The enclaves so ceded were as follows:

Subsection in Article III	*Royce Area*	*Approximate Acreage*
(1)	12 Ohio	23,040
(2)	13 Ohio	2,560
(3)	14 Ohio	23,040
(4)	15 Ohio	23,040
(5)	16 Ind.	23,040
(6)	17 Ind.	2,560
(7)	Unnumbered; red line in west-central Indiana (Royce)	23,040
(8)	18 Ohio	92,160
(9)	19 Ohio	23,040
(10)	Ft. Sandusky; unnumbered dotted black line near Sandusky, Ohio (Royce)	23,040
(11)	20 Ohio	2,560
(12)	Detroit; unnumbered; dotted black line (Royce Michigan, from Saginaw Bay to Lake Erie)	288,000
(13)	21, 22, 23 Michigan	38,817
(14)	24 Ill.	23,040
(15)	Unnumbered; dotted black line (Royce Illinois 1)	92,160
(16)	Unnumbered; dotted black line (Royce Illinois 1)	23,040

In the last paragraph of Article III, the Indians granted the United States rights of passage along certain routes described therein which connected certain of these enclaves with the principal area ceded and with each other. These easements of passage are described as follows in the treaty:

> [150] And the said Indian tribes will allow to the people of the United States a free passage by land and by water, as one and the other shall be found convenient, through their country, along the chain of posts herein before mentioned; that is to say, from the commencement of the portage aforesaid at or near Loromie's store, thence along said portage to the St. Mary's, and down the same to Fort Wayne, and then down the Miami to Lake Erie; again from the commencement of the portage at or near Loromie's store along the portage from thence to the river Au-Glaize, and down the same to its junction with the Miami at Fort Defiance, again from the commencement of the portage aforesaid, to Sandusky river, and down the same to Sandusky bay and Lake Erie, and from Sandusky to the post which shall be taken at or near the foot of the rapids of the Miami of the lake, and from thence to Detroit. Again from the mouth of Chikago, to the commencement of the portage, between that river and the Illinois, and down the Illinois river to the Mississippi, also from Fort Wayne along the portage aforesaid which leads to the Wabash, and then down the Wabash to the Ohio. And the said Indian tribes will also allow to the people of the United States the free use of the harbours and mouths of rivers along the lakes adjoining the Indian lands, for sheltering vessels and boats, and liberty to land their cargoes where necessary for their safety. [7 Stat. 50-51]

In Article IV of the treaty, 7 Stat. at 51, the United States "[i]n consideration of the peace now established and of the cessions and relinquishments of lands made in the preceding article by the said tribes of Indians . . ." relinquished its claims ". . . to all other Indian lands . . ." on the Indian side of the Greeneville Treaty Line, except the following tracts:

> 1st. The tract of one hundred and fifty thousand acres near the rapids of the river Ohio, which has been assigned to General Clark, for the use of himself and his warriors. 2d. The post of St. Vincennes on the river Wabash, and the lands adjacent, of which the Indian title has been extinguished. 3d. The lands at all other places in possession of the French people and other white settlers among them, of which the Indian title has been extinguished as mentioned in the 3d [151] article; and 4th. The post of fort Massac towards the mouth of the Ohio. To which several parcels of land so excepted, the said tribes relinquish all the title and claim which they or any of them may have.

These four excepted tracts are as follows:

Subsection in Article IV	Royce Area	Approximate Acreage
1st	25 Ind.	150,000
2nd	26 Ind.	1,800,000
3rd	-	-
4th	27 Ill.	-

In consideration for these cessions, the Indian signatories were immediately granted goods valued at $20,000, together with an annuity of $9,500 in goods, apportioned as follows: $1,000 to each of seven tribes—Wyandots, Delawares, Shawnees, Miamis, Ottawas, Chippewas, and Potawatomis; and $500 to each of five tribes—Kickapoos, Weas, Eel Rivers, Piankeshaws and Kaskaskias.

In the findings of fact which follow, we will consider Royce Area 11 first, and then the other areas relinquished by the Indians at Greeneville in 1795.

Royce Area 11

4. *Early Use and Occupancy.* Before 1650, the southern shores of Lake Erie were used and occupied by a group of Indians known as the Eries. The Eries were totally destroyed as an entity about 1655 by the Iroquois Confederacy, which occupied what is now New York State. Those Eries not exterminated were carried off to New York and were assimilated into the Iroquois Confederacy. [152] The Iroquois did not, however, then use and occupy the former Erie domain. A few years before, in 1650, the Iroquois had conquered the Huron Indians and their allies who who had been occupying the Ontario Peninsula, a rich game area, north of Lakes Erie and Ontario. After the Hurons and their allied Indians were pushed westward, the peninsula became the chief hunting grounds of the Iroquois and their principal source of fur for trade with the Dutch, and later the English, at Albany. The Iroquois had no immediate need for and did not use and occupy the area along and adjoining the southern shores of Lake Erie, although they are known to have occasionally traversed the eastern portions of Royce Area 11 adjoining Pennsylvania and the Ohio River on their way to raid down the Ohio River.

Another reason the Iroquois did not use and occupy the area south of Lake Erie was because the Andastes, an enemy tribe who lived on the Susquehanna River to the southeast, frequently hunted across the general area south of Lake Erie.

By 1680, war parties of western Indians were traversing the southern shores of Lake Erie to raid the Iroquois, and the Iroquois were using these same routes to raid westward. Except for these war parties and some sporadic hunting, the northeastern portion of Royce Area 11[1] remained unoccupied into the early 18th century.

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[1] That area which will in these findings of fact be hereinafter referred to as "northeastern" Royce Area 11 is the area bounded on the north by Lake Erie, on the east by

[153] Less is known about early occupancy of the lower portion of Royce Area 11. The Iroquois did make periodic raids down the Ohio River into southwestern Royce Area 11. During the 1660's, the Iroquois defeated a tribe known as the Mosopeleas who who were apparently closely related to the Shawnees[2] and who then occupied an area in southwestern Royce Area 11. After defeat by the Iroquois, the Mosopeleas fled west. There is no other evidence of Indian use and occupancy of southern Royce Area 11 until the 18th century.

5. *Dominance of the Iroquois.* The Iroquois Confederacy had been the dominant Indian force in the Lower Great Lakes region during the 17th century. They had overwhelmed the Eries, pushed the Hurons out of the Ontario Peninsula, and periodically raided down the Ohio. However, by 1700, the might of the Iroquois was on the wane. The French-supported Indians around the lower Great Lakes were exerting pressure on the Iroquois. In 1701 at Montreal, the Iroquois made peace with the French and the French-allied Indians and pledged neutrality as between the French and English. Although remaining nominally allied with the English thereafter because of their location within the English sphere of influence, the Iroquois kept their pledge until the demise of the French interests in North America.

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[1] (Continued)

the Pennsylvania state line, on the west by a north-south line following the Cuyahoga River, the Cuyahoga-Tuscarawas portage, and the Tuscarawas River as far south as Bolivar in northern Tuscarawas County, and on the south by a straight line from Bolivar to the point on the Ohio River where the States of Ohio, Pennsylvania, and West Virginia meet. The predominant topographical feature this region is the drainage system of the Cuyahoga River.

[2] Archaeological evidence from sites around Cincinnati indicates the possible presence of Shawnee or Shawnee-related Indians at an early date.

6. *European Claims and Relations with the Indians.* By 1700 the English and French were becoming aware of the value of the region south of Lake Erie. The French claimed this general area based on [154] the rights of discovery. Beginning in 1671, French explorers, probing southward from Canada, had formally annexed all newly-discovered lands. In 1682, LaSalle thus established French claim to possession of the entire Ohio Valley. Later, in 1718, a notable French map drafted by Guillaume Delisle made a claim to the Ohio Valley as part of French Louisiana.

In 1701 the French established the trading post at Detroit to expand French fur trade and to limit the potential area south of Lake Erie exploitable by the English. Cadillac, the founder of Detroit, came down from the post of Michilimackinac and invited a number of Indian tribes to establish villages at Detroit. These tribes included the Ottawa, Miami, Potawatomi, Chippewa and Wyandot (Huron). These tribes had been living to the north (Michilimackinac) and west (Chicago north to Green Bay), which areas in the latter half of the 17th century had became sanctuaries from the Iroquois. The Miamis left Detroit about 1708 after a dispute with other Indians there, and settled on the Upper Wabash and Maumee Rivers in Indiana, west of Royce Area 11.

The English used the period of earlier Iroquois conquest as the basis for the theory that, as conquerors of the tribes inhabiting the western territories, the Iroquois became the owners of the lands to the west, and western tribes became the dependents of the Iroquois. Since the Iroquois were nominally allied with the English, the English claimed them as subjects of the Crown, thereby asserting an English claim of sovereignty to these lands.

To codify these claims, the English had the Iroquois execute two deeds to the western lands, in 1701 and in 1726. These were the [155] so-called "beaver deeds," in which the Iroquois claimed the western lands by right of conquest, deeded to the English a vast territory, measuring approximately 800 miles east to west, and 400 miles north to south, west of the actual Iroquois lands in New York, but reserved to themselves the rights to take beaver from these lands.

7. *Indian Use and Occupancy in the Early 18th Century.* The Iroquois continued to do almost all of their hunting north of Lake Erie on the Ontario Peninsula in the early 18th century. The other eastern tribes who later played a major role in the resettlement of Royce Area 11 were, at this time, located considerably to the east and south of the Ohio River. There is no evidence of other than sporadic Indian use or occupancy of northeastern or southeastern[3] Royce Area 11 during the early 18th century.

From Detroit and the Miami settlements in Indiana, the western Indians, in the early 18th century, began to probe into Royce Area 11 to hunt in winter and to raid south of the Ohio River. The western Indians utilized three basic routes into and through Royce Area 11. The primary route to the south from Detroit was the Sandusky-Scioto [156] route through central Ohio. This involved canoe travel from the mouth of the Detroit River across Lake Erie to Sandusky Bay and then a short portage to the Sandusky River. This route then proceeded up the Sandusky River to the portage to the Scioto and down the Scioto River to the Ohio River and across to Kentucky. A second route was the Maumee-Au Glaize-Miami route through western Ohio. The third route was the way east to the Allegheny country and the upper Ohio. This route followed the southern shore of Lake Erie to the Cuyahoga River, then up the Cuyahoga River to the point of portage via the Tuscarawas River to the Muskingum River.

Other than occasional hunting along these routes and using them to travel south of the Ohio River, there is no evidence of Indian use and occupancy of the western portions of Royce Area 11 in the early 18th century.

8. *Early Resettlement of Royce Area 11.* Beginning around 1730, Indians started to settle near Royce Area 11.[4] By 1731, it is known that several hundred Delaware and Shawnee, and some Mingoes[5] were settled on the Allegheny and upper Ohio Rivers in western Pennsylvania, a few miles east of Royce Area 11.

The earliest resettlement of Royce Area 11 which can be authoritatively established was a Shawnee village at the mouth of the Scioto River in central[6] Royce Area 11 in the late 1730's. There were two other Indian settlements at about this same time close to Royce Area 11. The first was a Delaware village located up the Ohio across from Royce Area 11, the occupants of which migrated into Royce Area 11 after 1740. The other settlement was located at the mouth of the Sandusky River, north of central Royce Area 11. This latter village was settled by Wyandots, under Chief Nicholas, who had migrated from Detroit.

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[3] In these findings of fact "southeastern" Royce Area 11 is the area bounded on the east and southeast by the Ohio River, on the southwest by the Hocking River, on the west by a line south-southwest from the northeast corner of present Knox County to the town of Lancaster on the upper Hocking River in Fairfield County, and on the north by the Greeneville Treaty line from the northeast corner of Knox County to Bolivar and thence east to the point on the Ohio River where the States of Ohio, Pennsylvania and West Virginia meet. The central topographical feature of this region is the Muskingum River, flowing into the Ohio River near present-day Marietta, and the tributaries of the Muskingum.

[4] There is a statement by Butterfield, a 19th Century Ohio historian (*Historical Account* (1873), at 161; Def. Ex. 119) that Delaware Indians had settled on the Muskingum River in 1724. The only support for this is the statement in 1754 of Conrad Weiser, the noted Pennsylvania trader, to the Six Nations of New York at an Albany Council (O'Callaghan, ed., *Documents*, Vol. VI (1855), at 872; Def. Ex. 110). Weiser includes Shawnees as alleged settlers. If Indians were there as early as 1724 it is unlikely they remained in light of the absence of any contemporary documentation.

[5] "Mingo" is the term usually used to describe certain Iroquois Indians, largely Senecas, who had left the villages of the main Iroquois Confederacy and formed new settlements in Pennsylvania and Ohio. By the time of the Greeneville Treaty in 1795 they were usually referred to as "Senecas of Sandusky." (*See*, Hodge, *Handbook of American Indians* (1907), Part I, at 867.)

9. *Continued Resettlement*: *1740-1750.*

a. *Eastern Royce Area 11.* In 1742, a group of Seneca Indians, the westernmost of the Iroquois, moved to the Cuyahoga River, which is the western boundary of northeastern Royce Area 11. By the next year, French reports from Detroit indicate that several other Iroquois groups, Delawares, Abernakis and Chippewas had joined the Senecas in what had become a large, predominantly Iroquois town on the west bank of the Cuyahoga River. On the east bank about five miles from the river's mouth, a group of Ottawas from Detroit had also established a village [158] by 1743, and they remained there until about 1750.

There were several reasons for this migration to the Cuyahoga. The French were encouraging westward movement of the eastern tribes for trade purposes. In addition, a severe famine had struck many of the Great Lakes Indians in 1741 and 1742, particularly the Senecas in western New York. The excellent hunting around the Cuyahoga and within northeastern Royce Area 11 provided the Indians with both food and furs for trade with the Europeans.

The English took this opportunity to expand their trade westward. English traders from New York and Pennsylvania quickly moved into the Cuyahoga area. The French retaliated, after the outbreak of King George's War in 1744, by attempting to force the English traders from Cuyahoga with their own troops, and by inciting the Indians against the English. By 1745, however, the English had effectively blockaded the St. Lawrence River causing a scarcity of French trade goods. As a result, the Indians sided with the English and, in 1747, united in an anti-French conspiracy, led by Nicholas, the Wyandot chief at Sandusky, which brought about the murder of several French traders fleeing from Cuyahoga to Detroit, the general harassment of the French in the lower Great Lakes region, and an abortive attack on the French post at Detroit. Nicholas then moved his Wyandots east from Sandusky to Cuyahoga and the protection of the English.

[159] The extensive Indian settlements around Cuyahoga were short-lived. By 1750 these settlements were breaking up as the Indians moved to other locations in and out of Royce Area 11. The Wyandots did not stay long at Cuyahoga. Some in late 1748 moved farther east into Pennsylvania, while the majority, under Nicholas, moved into southeastern Royce Area 11 where they settled at the forks of the Muskingum River. The Ottawas left their village on the Cuyahoga and moved to a site at the injunction of the Tuscarawas River and Big Sandy Creek near present Bolivar within Royce Area 11. The Senecas at Cuyahoga again moved eastward joining the Mingoes in western Pennsylvania. The other Iroquois Indians at Cuyahoga most probably either accompanied the Senecas or returned to New York and the main Iroquois settlements.

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[6] "Central" Royce Area 11, in these findings, is bounded on the east by the line described in n. 3, *supra,* as the western boundary of southeastern Royce Area 11, on the south by the Ohio River, on the west by the drainage between the Scioto River and the Great Miami and Little Miami Rivers (which may be described as a north-south line from northeastern Logan County on the Greeneville Treaty line to the southeastern corner of Brown County on the Ohio River), and on the north by the Greeneville Treaty line from a point in northeastern Logan County east to the northeast corner of Knox County. The predominant topographical feature of this region is the Scioto River, which flows into the Ohio River at present-day Portsmouth, and the Scioto's tributaries.

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About 1743 a small group of Delawares formed a settlement at the head of the Muskingum River close to the mouth of the Walhonding River in southeastern Royce Area 11. East of this settlement there was, at about the same time, another on the Tuscarawas River that was probably, but cannot be conclusively established as, Delaware.

(b) *Central Royce 11.* The Shawnee village at the mouth of the Scioto River had, by 1750, grown to approximately 300 inhabitants who were mostly Shawnee but who are also known to have included several Mingoes. North of this village there were four known Delaware towns: Hockhocking or French Margaret's Town, on the upper Hocking River; Maguck on the upper Scioto; and Hurricane Tom's Town and Wanduchale's Town, on the middle Scioto. The occupants of the latter settlement were [160] that same group of Delawares who had previously been occupying a site across the Ohio River from southeastern Royce Area 11 in 1740.

c. *Western Royce Area 11.* In western[7] Royce Area 11, a group of pro-English Miami Indians under Chief La Demoiselle left the main Miami settlement at Kekionga on the Wabash River in Indiana in 1747 or 1748, shortly after the abortive Wyandot-led, anti-French conspiracy, and moved into Royce Area 11, where they settled at the mouth of Loramie Creek near the head of the Great Miami River. This settlement was considerably more accessible to traders from the English settlements to the east and, correspondingly, farther away from the Detroit-based French. Another Miami chief, Le Baril, established a small settlement near the mouth of the Little Miami River about 1749, which was reported to have consisted of six Miami and two Mingo huts. By 1750, English traders were active among these Miami settlements.

d. *Indian and White Political Relationships.* During this decade the English colonies first established direct political contact with the Indians living west of the Allegheny Mountains. Earlier, it had been accepted by the colonies that New York took precedence in dealing with the Six Nations Iroquois Council at Onondaga. It had also been generally accepted, because of the small number of Indians in Ohio, [161] coupled with the historical ascendancy of the Six Nation Iroquois among the Indians in the lower Great Lakes region, and the beaver deed cessions of the Iroquois to the English conducted by New York, that the Onondaga Council of the Six Nations held the political power to deal with the English and that the Delawares and Shawnees in western Pennsylvania, and later Ohio, were politically dependent upon the Six Nations Onondaga Council. This relationship was encouraged by both the Six Nations at Onondaga and the New York colony.

With the increased westward migration of Delawares, Shawnees and Six Nation Indians, friction arose among these Indians and the Six Nations at Onondaga, and the control and influence of the latter declined. At the same time, the other colonies particularly interested in the area west of the Ohio River—Pennsylvania and Virginia—were becoming increasingly unwilling to defer to New York in dealings involving their own interests west of the Ohio. By 1750, a series of events took place which initiated the breaking down of these old relationships to reflect the actual state of intra-Indian and Indian-white relationships.

In 1747, during King William's War, the Pennsylvania Provincial Council decided to send presents to Indians at Cuyahoga and "at Ohio" (i.e. on the Ohio River and in Royce Area 11 west of the Ohio River). That same year a group of Six Nation Indians living "at Ohio" visited Philadelphia and were promised gifts. They also informed the [162] Pennsylvanians that they

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[7] "Western" Royce Area 11, in these findings is bounded on the east by the line described in n. 6, *supra,* as the western boundary of central Royce Area 11, on the south by the Ohio River, and on the north and west by the Greeneville Treaty Line. The predominant topographical feature here is the drainage system of the Great Miami and Little Miami Rivers.

> . . . had concluded to kindle a Fire in their Town, and had invited all the Indians to a considerable distance round about them to come to their Fire in the Spring, and that they had consented to it. [Min. Pa. Prov. Council, Vol. 5, at 148; Def. Ex. 143.]

The kindling of their own council fire signified they were intended thereafter to manage their own affairs independent of the Six Nations Onondaga Council. The next year Pennsylvania held a council at Logstown with several groups of Indians living "at Ohio," including Senecas, Shawnees, Wyandots, Missisougas, Mohawks, Mohicans, Onondagas, Cayugas, Oneidas and Delawares, where presents were made directly to these Indians by Virginia and Pennsylvania. By 1750, Broken Kettle, a Seneca chief in Ohio, was speaking in the name of the "Ohio Council" and was stating that the Ohio Council had ". . . got many to join us, and are become a great Body, and desire to be taken notice of as such . . . ." (*Id.*, at 439.)

In 1750 at the Shawnee village at the mouth of the Scioto there was a general council of Ohio Indians consisting of Shawnees, Wyandots, Delawares and Six Nation Indians. It was reported that the Indians at this council (there were apparently no whites present) agreed among themselves that all of Ohio east of the Great Miami River belonged to the Delawares, Shawnees and Six Nation Indians living in Ohio, but that the Wyandots were free to hunt there, that the lands west of the Great Miami River were the property of a confederacy comprised of Miamis, Piankeshaws, Weas, Kickapoos, and Mascoutens, and that the lands along Lake Erie west from Niagara and north to Michilimackinac belonged to the Ottawas, Potawatomis and Wyandots.

10. *Royce Area 11 from 1750 to 1764.*

a. *European Rivalries.* In the first few years after 1750, the English with their trading centers at Cuyahoga (for the few Indians who remained there), on the Muskingum, at the Shawnee village at the mouth of the Scioto, and at the Miami settlement in western Royce Area 11, had been able to make allies of the Ohio Indians. However, with the outbreak of the French and Indian War and the early French successes, the Ohio Indians generally realigned themselves with the French except some Six Nation, Delaware and Shawnee Indians living in southeastern Royce Area 11, who, as hostilities began, moved eastward into Pennsylvania.

Even before the actual beginning of the war, the French had retaken the initiative among the Indians. In 1752, a French-led Ottawa force destroyed the Miami town in western Royce Area 11 and the English trading center there. Most of the Miamis fled west to Kekionga on the Wabash River while a few went south to the Shawnee village at the mouth of the Scioto. The last reference to Le Baril's town at the mouth of the Little Miami River is in 1755. After this date, the Miamis had no settlements within Royce Area 11, although they hunted and took an active part in the warfare there in later years.

[164] With the start of the war, the French pressed east from Detroit along the southern shore of Lake Erie. By 1755, French-allied Indians, particularly Delawares, were raiding English settlements in Pennsylvania, and the Shawnees were attacking settlements across the Ohio River in western Virginia. Shortly thereafter the French advance collapsed and they retreated west. Montcalm's defeat at Quebec in 1759 ended the war with the English in full control as far west as Detroit, which the French surrendered in 1760. Subsequently, at the Treaty of Paris in 1763, the English succeeded to the French interests.

b. *Indian Relations with the English.* The English adopted a harsh policy of retribution toward the Ohio Indians at the conclusion of the war. They discontinued the practice of giving presents to the Indians, and they very sparingly supplied the Indians with firearms and ammunition which the Indians needed for hunting. The Ohio Indians strongly began to fear that the English would take their lands from them.

Indian resentment reached a peak in the spring of 1763 with the widespread revolt known as Pontiac's uprising, during which successful attacks were made on all forts from Lake Michigan to the Pennsylvania frontier, except Detroit and Fort Pitt. In August 1763, General Henry Bouquet defeated the Indians at Bushy Run and relieved Fort Pitt, while in October Pontiac's Ottawas and their allies abandoned their seige of Detroit. One year later, General Bouquet led a force of 1500 to the Muskingum River settlements, the intimidated Indians [165] came to terms, and thereafter, until shortly before the American Revolution, Ohio remained quiet with the English in total control. The lessons of Pontiac's uprising were not, however, lost on the English. Their harsh policies were relaxed and the British Crown in October 1763, issued a proclamation prohibiting all settlement west of the crest of the Allegheny watershed, including Royce Area 11.

c. *Inter-tribal Relationships.* During this period, the Ohio Indians continued to assert their growing independence of the Six Nations Onondaga Council. The fact of their pro-French involvement reflected the inability of the Six Nations of New York to control their actions. Sir William Johnson, New York's representative to the Six Nations, made several requests to the Six Nations of New York urging them to bring the rampaging Ohio Indians under control, but to no avail. Later, in 1761, Johnson, over the protests of the Six Nations of New York, journeyed to Detroit to council with several western tribes. At this council he informed the Indians that he would ". . . treat with you independent of any other Nation, or Nations of Indians whatsover . . . ." (Sullivan, ed., *Johnson Papers*, Vol. 3, at 480; Def. Ex. 191.)

d. *Indian Use and Occupancy.* In northeastern Royce Area 11, the mixed Indian settlement at Cuyahoga had apparently ceased to exist by 1752. There is documentation to the effect that, in the years following 1752, Mingoes from Pennsylvania were hunting in the eastern portion of this region. In 1756, a group of Ottawas, Chippewas and Caughnawaga Mohawks from the Detroit-Sandusky Bay area hunted across northeastern [166] Royce Area 11. There are also reports of Ottawas, Chippewas and Potawatomis from Detroit hunting there around 1759 or 1760. There were several reported Delaware villages in northeastern Royce Area 11 around 1760 (on the Cuyahoga, Tuscarawas, and Mahoning Rivers) and an Ottawa village on the Cuyahoga River. All of these settlements were abandoned, however, in the early 1760's at the time of Pontiac's uprising.

The Wyandots who had settled on the Muskingum in the late 1740's left there about 1752 and returned again to the area of Sandusky Bay north of Royce Area 11. Although it is documented that subsequently Wyandots frequently hunted within Royce Area 11, particularly within the northeastern region and the central region along the headwaters of the Scioto, there is no evidence of any Wyandot settlements within Royce Area 11 from this time until shortly before 1795, when there were Wyandots settled along the upper Scioto River and the upper Mad River.

Despite the absence of settlements within Royce Area 11, the Wyandots exerted considerable influence among the other tribes who had settlements within Royce Area 11 beginning at this time. Among the Indians, particularly the Delawares, it was understood that the Wyandots had claims to the lands in northeastern Royce Area 11 and the southeastern portion along the Muskingum. Reports of these claims appear as early as 1751 and continue up to the 1780's, where in the proceedings at the Fort McIntosh Treaty, chiefs of the Delawares and [167] Wyandots made statements that the Wyandots had given the Delawares the lands on which they settled along the Muskingum and in northeastern Royce Area 11. The source of these claims is not known, but the Indians respected them.

Beginning about 1758, many of those Delawares who had sought English protection during the war moved

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back to the headwaters of the Muskingum River in southeastern Royce Area 11. By 1763 there were at least six Delaware towns in existence on the Muskingum and its tributaries. There was also one known Shawnee town in this area and three other towns of undetermined composition. A Mingo town, which was settled in 1760 and in which some Delawares also resided, was located near present-day Steubenville, at the mouth of Cross Creek on the Ohio River.

The Shawnee village at the mouth of the Scioto was in existence until 1758 when the inhabitants moved upriver to the Pickaway Plains area of central Royce Area 11, near present-day Circleville. There were two other known Shawnee towns in this area by 1763. At the close of this period, the Delawares continued to occupy their town of Hockhocking on the upper Hocking River which had been first settled much earlier.

There is no evidence to indicate any settlements in western Royce Area 11 during this period. There is documentation of Shawnees hunting on the Great Miami River in 1764, and Miamis, from their settlements on the Wabash, hunting in western Royce Area 11 during this period.

[168] 11. *Same*: *To the American Revolution.*

a. *Indian Use and Occupancy.* During the period from 1764 to the beginning of the American Revolution, northeastern Royce Area 11 remained a region of transient hunting by tribes from other locations. There are reports of winter hunting along the Cuyahoga and east to the Mahoning by Delawares, Chippewas, Ottawas and Mingoes. It is also most probable that the Sandusky-based Wyandots continued to hunt east of the Cuyahoga.

The thick concentration of Delaware settlements continued to exist on the upper tributaries of the Muskingum River, and the Delawares may certainly be termed the predominant tribe in southeastern Royce Area 11 during this period. An indication of this Delaware predominance

is the fact that in 1769 Moravian missionaries from Pennsylvania sought and received Delaware permission (after consultation with the Wyandots) to settle some of their Indian converts, who were Delawares, Munsees and Mohicans, east of the Delaware settlements on the upper Muskingum. Soon thereafter, the Moravian Indians founded a town on the east bank of the Tuscarawas River, a few miles southeast of present New Philadelphia in Tuscarawas County. Within the next few years, two additional Moravin towns were established in this area.

In central Royce Area 11, the Shawnees continued to predominate. Several Shawnee towns continued to exist in the Pickaway Plains area on the middle Scioto River. The Delawares continued their occupation of Hockhocking on the Hocking River. Two Mingo villages are recorded on the upper tributaries of the Scioto in the early 1770's. These [169] Mingoes apparently migrated from the Mingo town (near present-day Steubenville) on the Ohio River in southeastern Royce Area 11 around 1771. All of the village sites in this area were located in its northern region, on the middle and upper Scioto and its tributaries. The portion of this area closer to the Ohio River was an area of extensive hunting, but no village sites can be verified during this time. There are reports of Delawares and Shawnees, as well as some Ottawas and Six Nation Indians, hunting along the Ohio. Southern Indians, particularly Cherokees, also hunted on both sides of the Ohio.

In western Royce Area 11, hunting by Shawnees and Miamis continued. In addition, a group of about 170 Shawnees moved, in about 1773, from the Shawnee area of concentration on the Scioto to the upper Little Miami River and established a settlement there.

b. *British-Indian Relationships.* After Pontiac's uprising, the Ohio Indians remained very concerned about British intentions with respect to the lands west of the Alleghenies. In 1765, the British concluded peace treaties with certain of the Ohio Indians—Delawares, Shawnees and Six Nations Indians living "at Ohio." In these treaties, the Indians agreed to abide by any boundaries subsequently set between the English and the Six Nations of New York. Despite the peace treaties, relations between the Indians and the British colonies worsened as settlers from Pennsylvania and Virginia were moving onto lands (primarily in southwestern Pennsylvania) which the Indians claimed were theirs. The Indians threatened war and made plans for councils of all Indians [170] from Pennsylvania to Detroit to consider concerted action. At this point, Sir William Johnson decided that a treaty council with all interested Indians was the only way to avoid hostilities.

In October of 1768, at Fort Stanwix in New York, Johnson met with a large representation of the Six Nations of New York, and smaller groups of Mingoes, Shawnees and Delawares. The treaty negotiated at Fort Stanwix established the Ohio River below Fort Pitt as the boundary between British and Indian lands. East of Fort Pitt, the line ran across the Allegheny Mountains and north through New York, leaving intact most of the Six Nations' lands in New York. While the deed determining the boundary line was executed in the name of ". . . the Six Confederate Nations, and of the Shawanese, Delawares, Mingoes of Ohio and other Dependent Tribes . . .," only chiefs representing the Six Nations of New York signed it. (*See* O'Callaghan, ed., *Documents,* Vol. VIII, at 135-137; Def. Ex. 238.)

The Ohio Indians, however, were not satisfied with the Fort Stanwix Treaty. They felt that the Six Nations of New York had given lands to the British which belonged to the Ohio Indians and, in addition, had received all the consideration therefor. The treaty proceedings show that the Ohio Indians had good cause for their discontent. There were very few Ohio Indians present and, in such circumstances, the Six Nations of New York assumed the prerogatives they had long considered to be theirs in dealing with the British on behalf of the Ohio Indians. Johnson acquiesced in this at the treaty proceedings.

[171] In the years following, the Delawares, Shawnees and Mingoes caused a great deal of trouble, raiding on the Pennsylvania and Virginia borders. During this time the Ohio Indians also continued the attempt to form a confederacy to fight the British. In late 1774, Lord Dunmore, who was the Governor of Virginia, set out from Fort Pitt with a large force to meet the Ohio Indians in the Scioto River area of central Royce Area 11, the area of Shawnee concentration. While the military engagements were inconclusive, the Virginians did destroy a number of Indian towns. The principal importance of Lord Dunmore's War, as it is called, was its effect upon the patterns of Indian use and occupancy of Royce Area 11. Pressure upon the Indians first initiated by the colonists during this war forced the Indians westward and northward, eventually out of Royce Area 11.

In 1775, the first rumblings of the American Revolution reached Ohio. In that year, one James Wood was dispatched by the Americans to the Ohio Indians to explain the American position. Wood visited all the major tribes settled in and around Royce Area 11 urging them to attend an American-sponsored council to be held at Pittsburgh later that year. That council, attended by Delawares, Shawnees, Ottawas, Wyandots and Mingoes, and a second council held at Pittsburgh in 1776, attended by Delawares, Shawnees and Mingoes, sought to keep the Indians neutral.

[172] 12. *The American Revolution.*

a. *Indian Involvement.* From 1776 to 1794, there was almost continuous warfare within Royce Area 11 and the surrounding areas. By late 1776, each side was seeking to align the Ohio Indians with itself. At the end of 1776, the pro-American Indians consisted of a small faction of Delawares and Shawnees located at Coshocton on the upper tributaries of the Muskingum. The Wyandots, Mingoes, Ottawas, Chippewas, and the majority of the Shawnees and Delawares had sided with the British. In the first years of the war, there were frequent Indian raids against the American frontier settlements from Virginia to Kentucky. Early in the war, the British set up a trade and supply base at Cuyahoga for their Indian allies.

On September 17, 1778, representatives of the American Government entered into a treaty with representatives of the pro-American faction of Delawares. *See* 7 Stat. 13. In Article II, the parties pledged to each other "perpetual peace and friendship." In response to British propaganda that the Americans were seeking Indian lands, the Americans, in Article VI, guaranteed the Delawares "* * * and their heirs, all their territorial rights in the fullest and most ample manner, as it hath been bounded by former treaties, as long as they the said Delaware nation shall abide by, and hold fast the chain of friendship now entered into." The reference to "former treaties" was, as can best be determined, not to treaties, but to unsubstantiated claims made by the Delaware chief, White Eyes, to large portions of Ohio at meetings at [173] Pittsburgh with the Americans in 1775 and early 1778. The purpose of the treaty was to persuade these Delawares to side with the Americans. However, despite the treaty, by 1781 many of these Delawares had also joined the British.

By 1778, the Americans were on the offensive in Ohio with raiding parties and larger troop movements attacking from east and south. In February 1778, a force led by General Hand unsuccessfully attempted to reach the British post at Cuyahoga. In May 1779, Colonel John Bowman with a force of Kentuckians, crossed into Ohio near present-day Cincinnati and marched as far as a Shawnee town on the middle Great Miami River.[8] In 1780, General George Rogers Clark attacked western Royce Area 11, striking several Shawnee settlements near the junction of Loramie Creek and the Great Miami River. Clark returned in 1782, destroying other Shawnee villages on the Great Miami River.

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[8] The westward movement of Indian settlements within Royce Area 11 during this period is discussed ***infra.***

In 1781, Colonel Daniel Broadhead led an expedition into the Muskingum River area of Delaware settlements, and destroyed Coshocton and nearby Lichtenau, the Moravian town which had been abandoned previously. The next year an expedition led by Colonel David Williamson attacked and killed a group of ninety Moravian Indians who had returned to their former village of Gnadhutten to harvest their crops. Soon after, Williamson's force, joined by a larger force under William Crawford, marched from southeastern Royce Area 11 via the Tuscarawas River to attack the Wyandots at Sandusky. The Wyandots, with assistance from [174] Delawares, Shawnees, and British troops from Detroit, repulsed this attack.

b. *Indian Use and Occupancy.* During the war years the patterns of use and occupancy of Royce Area 11, which had remained fairly consistent since the 1740's, broke down completely. Northeastern Royce Area 11 alone remained relatively unchanged. Hunting continued here by Delawares, Ottawas, Chippewas, Wyandots and Mingoes. No settlements are noted but the Indians did utilize the British post at Cuyahoga. The Muskingum area in southeastern Royce Area 11 remained almost exclusively Delaware until the American raids of 1781 and 1782. At that time, the Delawares abandoned their settlements in the Muskingum area and scattered as far west as Indiana, with many joining the Wyandots at Sandusky.

Much the same occurred in the Scioto River region in central Royce Area 11. The Shawnees had begun moving west as early as 1773. By 1778 the concentration of Shawnee settlements on the Pickaway Plains had been abandoned and the Shawnees were living on the Great Miami River, where they were attacked by the Kentuckians in the early 1780's. The Delawares had abandoned their old village of Hockhocking at the beginning of the revolution. Reports indicate that a small concentration of Mingoes, under a chief named Pluggy, remained on the upper tributaries of the Scioto throughout the revolution.

As stated above, the Shawnees had, about 1780, evacuated central Royce Area 11 and moved westward. During the period between 1777 [175] and 1786, when western Royce Area 11 was a center of Indian use and occupancy, there may have been as many as sixteen towns on the upper Great Miami River and its tributary, the Mad River. In addition to the Shawnee concentration, there are reports of Delawares and Mingoes occupying towns in this region. However, with the commencement of the American raids up the Great Miami River, Indian occupation here became precarious and, as will subsequently be seen, ceased almost completely by the late 1780's. During this period, as earlier, there is no documentation of village sites in the lower portion of western Royce Area 11 along the Ohio River. We do know, however, that this region was used for winter hunting during this period by groups of Delawares, Shawnees and Wyandots.

13. *The End of the Revolution to the Greeneville Treaty.*

a. *State Land Claims in Ohio.* Even before the end of the American Revolution, the states were debating and disputing among themselves the future of the Northwest Territory of which Royce Area 11 was a part. The difficulty centered around the fact that certain of the states claimed sovereignty, by virtue of their colonial charters, to lands west of the Ohio River. The disputes were resolved, and the Articles of Confederation adopted, after the Continental Congress passed resolutions recommending that all lands claimed by the various states northwest of the Ohio River be ceded for the common benefit of the United States and be organized into separate states. Those states [176] with claims—Virginia and Connecticut claimed areas within Royce Area 11—subsequently relinquished them to the United States.

Virginia relinquished its claims in 1784, attaching several conditions, all of which were accepted by Congress. These conditions were: (1) that the ceded lands should be laid out in distinct republican states having the same rights of sovereignty, freedom and independence as the other states; (2) that the French and Canadian inhabitants and other settlers of Kaskaskia, Vincennes, and the neighboring villages who had professed themselves citizens of Virginia should have their possessions and title confirmed; (3) that 150,000 acres promised by Virginia to George Rogers Clark and the officers and soldiers of his regiment should be reserved for that purpose; (4) that the lands between the Scioto and Little Miami Rivers should be reserved for Virginia troops in its continental establishment in such proportions as had been engaged to them by the State of Virginia; and (5) that the lands within the territory not reserved or appropriated for any of these purposes or disposed of in bounties to officers and soldiers of the army be considered a common fund for the use and benefit of the United States.

Connecticut relinquished part of its claim in 1786. The remainder of Connecticut's claim, which constituted what is known as the "Connecticut" or "Western Reserve", was retained by that state until 1800. The Western Reserve included more than half of northeastern Royce Area 11.

[177] b. ***Indian Relations with the Americans.*** At the close of the revolution, the victorious United States were anxious to normalize relations with the Indians on the western frontier. However, this hope failed to materialize under the Articles of Confederation because federal officials attempted to force upon the Indians the concept that the United States had acquired title to the Indian lands by right of conquest and that the Indians, having allied themselves with the British, were accordingly dispossessed of their lands in Ohio and the remainder of the Northwest. This was the position taken at several peace treaties with various tribes held in the 1780's and, coupled with the friction created by the beginnings of the new nation's westward expansion, was a principal reason for the continued Indian warfare in Ohio up through the Battle of Fallen Timbers in 1794 and the Treaty of Greeneville which followed in 1795.

The first post-war treaty of peace was made with the Six Nations of New York at Fort Stanwix on October 24, 1784, 7 Stat. 15. The Commissioners appointed by the Continental Congress to treat with these Indians began the proceedings by telling the Six Nations of New York that their lands had been relinquished to the United States by the Six Nations' ally, the British, at the Treaty of Paris of 1783, and that the United States could rightfully claim all the Six Nations' lands by right of conquest. The Commissioners indicated, however, that the Government was willing to let the Six Nations of New York retain some of their lands. The Six Nations of New York were given no choice, and, [178] in Article III of the treaty, 7 Stat. 15-16, they agreed to relinquish to the United States any claims they had to all lands lying west of Niagara and Pennsylvania. The Commissioners disregarded assertions made by chiefs of the Six Nations of New York that they were empowered to speak for the Ohio Indians.

Immediately after the Treaty of Fort Stanwix, the Commissioners went to Fort McIntosh which was located about 30 miles down the Ohio River from Pittsburgh, to treat with the Wyandots, Delawares, Chippewas and Ottawas. At Fort McIntosh, the Commissioners again informed the Indians that the Indian lands belonged to the United States by right of conquest, but that the United States, in its generosity, would grant these Indians lands to hunt and live on. On January 21, 1785, a treaty was concluded with these Indians establishing a boundary line between the Delaware and Wyandot Nations which ran south from the mouth of the Cuyahoga River on Lake Erie, then west across Ohio to the Great Miami River, and then down the St. Mary's and Maumee Rivers to Lake Erie. Article IV of the treaty provided that: "The United States allot all the lands contained within the said lines to the Wiandot and Delaware nations, to live and to hunt on, and to such of the Ottawa nation as now live thereon. . . ." 7 Stat. 16, 17.

The Commissioners reported to the President of Congress that all Indian claims east of the Great Miami, St. Mary's and Maumee Rivers had been settled, and

the Congress, on May 20, 1785, passed legislation [179] providing for the survey of these Ohio lands.[9] Surveying began soon after, but was delayed and disrupted by the Indians. The first sales of these lands took place in 1787, and in that same year the Congress, on July 13, passed the Northwest Ordinance, reenacted August 7, 1789, 1 Stat. 50, establishing a government for the Northwest Territory.

The treaty with the Shawnees ordered by Congress was held at Fort Finney in western Ohio and was executed on January 31, 1786, 7 Stat. 26. This treaty followed the pattern set at Forts Stanwix and McIntosh. In Article VI, 7 Stat. at 27, the Shawnees yielded to the United States any title or pretense of title they had to the area previously relinquished by the other tribes at Forts Stanwix and McIntosh. Tht Shawnees were granted lands south of those granted at Fort McIntosh to the Wyandots and Delawares.

c. *Indian Hostility.* Following the Treaty at Fort Finney, Indian hostility in the Northwest Territory increased. Raids all along the frontier from Pennsylvania to Kentucky became common. The Indians, encouraged by British agents from Detroit and Canada, deeply resented the treaties they had been forced to execute, and they continued to regard all the territory west of the Ohio River as theirs. The British, up to 1795, did whatever they could to preserve their Indian fur trade and [180] their future interests in ownership of lands within the territory lost at the Treaty of Paris. The British, who retained their post at Detroit and a fort on the Maumee River even after the Battle of Fallen Timbers in 1794, were constantly furnishing the Indians with arms, ammunition, supplies and encouragement during this period.

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[9] The Congress, apparently not satisfied that all claims had been settled at Forts Stanwix and Fort McIntosh, also, in early 1785, ordered separate treaties to be held with the Shawnees, and with the Miamis, Potawatomis, Piankeshaws and other western tribes.

In December 1786, a general council of Indian tribes was held at a Wyandot village near the mouth of the Detroit River. This council sent a speech to the Continental Congress, on behalf of the "United Indian Nations" consisting of "the Five Nations, the Hurons, Delawares, Shawanese, Ottawas, Chippewas, Poutiwatimies, Troichtivees [Miamis], Cherokees, and the Wabash Confederates [i.e., Weas, Piankeshaws, etc.]," reiterating the Indians' contentions that the whites had no rights to their lands, and asking Congress to keep surveyors and settlers from crossing the Ohio River until another treaty was negotiated. (Speech of the United Indian Nations, December 18, 1786, and Report of the Indian Council at Detroit, December 24, 1786, in *Michigan Pioneer and Historical Coll.*, Vol. XI at 467-72; Pl. Ex. 2, Dockets 13-G, et al.)[10] A [181] congressional committee reported to the Continental Congress on August 9, 1787, that, since the United States did not want an Indian war, it would be advisable to replace the policy that lands in the Northwest Territory were held by right of conquest with a policy by which the Government would negotiate with the Indians on the basis of purchasing their lands. Consequently, in October 1787, Congress authorized Arthur St. Clair, Governor of the Northwest Territory, to hold a general treaty with the western Indians in order to remove all causes of controversy with them and to settle boundaries.

At the same time, however, the American Government was implementing the Northwest Ordinance. Settlement had begun at Marietta at the mouth of the Muskingum River within Royce Area 11, additional lands in Ohio were being surveyed, and the formation of a civil government was taking place. In light of these developments, the Indians were naturally pessimistic regarding the satisfaction of their demands. Thus, when the Indians assembled at Fort Harmar in December 1788 to negotiate with St. Clair, most of the important chiefs were not present. After two weeks of preliminary negotiations, the Peace Treaty of 1783 with Great Britain was read and explained to the Indians. The Indians then proposed the Ohio River as the Indian-American boundary line, but St. Clair replied that he could not deviate from the terms of the treaties concluded at Forts Stanwix, McIntosh and Finney. On January 9, 1789, a treaty was signed by representatives of the United States and the Sacs, Chippewas, Ottawas, Potawatomies, Delawares and [182] Wyandots, 7 Stat. 28, which provided that the Wyandots, Delawares, Ottawas and Chippewas confirmed the boundary negotiated at Fort McIntosh. The tribes were given $6,000 in goods as compensation for the lands and were granted the right to hunt upon the ceded lands. A companion treaty was also signed at Fort Harmar with the Six Nations, 7 Stat. 33. This treaty was, in effect, a confirmation of the 1784 Fort Stanwix treaty with the Six Nations of New York. The Indians were granted $3,000 worth of goods in return for the confirmation of the Fort Stanwix treaty.[11]

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[10] There is no evidence to indicate whether the "Five Nations" comprised any New York Indians. At a council with British Agent McKee at Detroit, shortly after the Indian council, Captain Joseph Brandt spoke for the Indians. Captain Brandt was a New York Mohawk who had sided with the British and migrated to Ontario in 1783, but who is known to have returned periodically after that time to the United States.

[11] The United States Constitution had gone into effect on March 4, 1789. Under the previous Articles of Confederation, there had been no provision for the ratification of treaties—they were effective when signed. Although the two Fort Harmar treaties were signed before the adoption of the Constitution, they were sent to the Senate on May 25, 1789, after its adoption, where the treaty with the western Indians was ratified but the treaty with the Six Nations was not. Both of the treaties, however, were regarded as valid. *See Miami Tribe* v. *United States*, Docket 253, 5 Ind. Cl. Comm. 180, 205-07 (1957).

The treaty at Fort Harmar with the western Indians served to relieve tensions among the Wyandots whose main interests were north of Royce Area 11, but it did nothing to bring peace with the Shawnees and those other Indians (Delawares, Miamis and Mingoes) who were now settled around the Wabash River in Indiana and in extreme western Royce Area 11. At the instigation of the British they continued to raid the expanding white settlements in Ohio and Kentucky and inflicted severe damage on settlers en route to Kentucky along the Ohio River. American forces were sent west in 1790 and 1791, but were decisively defeated [183] by the Indians.

Efforts continued to reach a negotiated peace with the Indians. At a council at the mouth of the Detroit River in 1793, the sticking point was again the boundary line. The Indians continued to insist on the Ohio River while the United States favored the line established at the previous treaties.[12] The failure of these negotiations led to the expedition of General Anthony Wayne. At the Battle of Fallen Timbers in 1794, Wayne defeated a large force of Indians, consisting of Chippewas, Shawnees, Delawares, Mingoes, Potawatomis, Ottawas, Miamis and Eel Rivers, and brought an end to Indian resistance within Royce Area 11.

d. *Indian Use and Occupancy.* The postrevolutionary period of warfare in Ohio brought an end to any consistent pattern of Indian use and occupancy of Royce Area 11. The Indians who had occupied Ohio had begun in the 1770's to migrate westward and northward to escape the white military expeditions which, starting with that of Lord Dunmore in 1774, had been invading Ohio in retaliation for Indian raids along the frontier. There was extensive Indian presence within Royce Area 11 during the decade preceding 1795, [184] but most of this consisted of war parties and hunting expeditions. By the late 1780's, the settlements of the hostile Indians were located west and north of Royce Area 11 on the waters of the Maumee and Au Glaize Rivers, at Sandusky and in Indiana. After 1786, Royce Area 11 was almost completely devoid of Indian settlements. There are reports of two small settlements in northeastern Royce Area 11 near the Pennsylvania border, where some Senecas, along with other Indians, were living. There were Ottawas and Chippewas hunting in the Cuyahoga region of northeastern Royce Area 11 around 1790, and Delawares, Wyandots and Shawnees were hunting in the Muskingum and Scioto areas about the same time. In western Royce Area 11 there were Shawnees hunting on the Great Miami River in the early 1790's. However, during this period, Indian use and occupancy was sporadic and was not confined to specific regions within Royce Area 11.

14. *The Treaties of Canandaigua and Greeneville.* After the Battle of Fallen Timbers, the United States consolidated its victory by entering into peace treaties with the Indians. These treaties were the culmination of the Indian wars in the Ohio region, and fully reflected the United States policy of land acquisition by purchase from the Indians.

At the Treaty of Canandaigua with the Six Nations of New York on November 11, 1794, Stat. 44, the United States made peace with these Indians and received a quitclaim to all territory within the United States not included within the New York lands of the Six Nations. The [185] Indians received consideration of $10,000 in goods and an annuity of $1,500.

In a letter of April 5, 1795, to General Wayne, Timothy Pickering, the United States Commissioner at the Treaty of Canandaigua, stated that he was convinced that the Six Nations had no valid claim to lands west of the Allegheny River, and that the quitclaim by the Six Nations

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[12] It appears that the United States would have, as a last resort, been willing to modify the line to the extent of lands not, at that time, granted to settlers. The negotiations never reached that point.

at Canandaigua had given the United States only "the shadow of a title to them." (Knopf, ed., *Anthony Wayne*, at 397; Def. Ex. 434). The Six Nations were not included in the Greenville Treaty negotiations which followed.

A few weeks after Wayne's victory at Fallen Timber, Indian moves for peace began and, from the fall of 1794 until the following June, Wayne was visited at his headquarters by numerous peace delegations from the formerly hostile tribes. Plans were made to negotiate the treaty in June 1795, and at that time Indian delegations began arriving at Greeneville. Actual negotiations began on July 15, and the treaty was signed on August 3, 1795.

The treaty's preamble states that its purpose was "to put an end to a destructive war, to settle all controversies, and to restore harmony and a friendly intercourse between the said United States, and Indian tribes. . . ." In Article III, the Greeneville Treaty line is described and the enclaves and easements of passage are delineated. In Article IV, [186] the United States relinquished its claims north and west of the treaty line, with certain specified areas excepted. Also, in Article IV, the consideration to the Indians is described and apportioned among them.

Article V explained that the Indian signatories were entitled quietly to enjoy the land relinquished by the United States, but the United States retained the sole right of preemption to all of the lands so relinquished. The Indians also acknowledged themselves to be under the sole protection of the United States. Article VII permitted the Indians to hunt on the lands they had ceded so long as they acted peaceably. Article X provided that all treaties made between the United States and any or all of the tribes signatory to the Treaty of Greeneville, after 1783, should "cease and become void."

The preamble to the treaty lists twelve tribes as contracting parties—"the Wyandots, Delawares, Shawanoes, Ottawas, Chippewas, Putawatimes, Miamis, Eel-river, Wea's, Kickapoos, Piankashaws, and Kaskaskias."[13]

[187] The treaty proceedings give considerable information regarding territorial claims made by certain of the tribes and Indian reaction to the prior treaties between the United States and the various tribes. Several of the chiefs present at Greeneville, including Little Turtle, a prominent Miami chief, and Bad Bird, a Chippewa chief from Mackinac, denied any knowledge of the Fort Harmar treaty. Massas, an Ottawa chief from Lake St. Clair who spoke on behalf of the Three Fires (the Ottawas, Chippewas and Potawatomis), claimed that while these tribes were present at Fort Harmar, they had bad interpreters and never became aware of what transpired there.

The Indians also made several claims of ownership to the western lands. Little Turtle claimed that the Miamis owned an immense area from Detroit to the mouth of the Scioto, west to the Wabash and then north to Chicago. Massas, for the Three Fires, claimed that the Ottawas, Chippewas and Potawatomis owned the lands ceded to the United States at Fort Harmar. Tarke, a Wyandot chief, put forth a different view of the ownership of the lands. He stated:

> No one in particular can justly claim this ground; it belongs, in common, to us all; no earthly being has an exclusive right to it, the Great Spirit above is the true and only owner of this soil and he has given us all an equal right to it.

Tarke also made an effort to resolve the Indian fears of future disputes over the tribal boundaries of the area on the Indian side of the Greeneville Treaty Line. Speaking, he said, on behalf of ". . . the [188] Wyandots, Ottawas, Delawares, and Six Nations of Sandusky, and the Delawares and Shawanese, from the waters of the Miami River," he requested Wayne to fix "the bounds of every nation's rights" within the Indian lands. Wayne declined to do this as a matter of ". . . impropriety, as well as impossibility." Said Wayne: "You, Indians, know best your respective boundaries." (*See* Lowne and Clarke, eds., *Amer. State Papers,* Ind. Affs., Vol. I, at 564-83; Def. Ex. 31.)

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[13] An official count taken on August 7, 1795, lists the following as having been present at Greeneville—180 Wyandots, 381 Delawares, 143 Shawnees, 45 Ottawas, 46 Chippewas, 240 Potawatomis, 73 Miamis and Eel Rivers, 12 Weas and Piankeshaws, 10 Kickapoos and Kaskaskias.

After the Treaty of Greeneville, the Indians adhered to the boundary line established there. The ceded area was quickly settled thereafter, and, on March 1, 1803, Ohio was admitted as a State of the Union.

Areas Other than Royce Area 11

15. *Generally.* Sixteen other areas (generally referred to as "enclaves") were relinquished to the United States in Article III of the treaty, as well as rights of passage along certain routes described in the last paragraph of Article III which connected certain of the enclaves with the principal area ceded and with each other. Furthermore, in Article IV of the treaty, the United States reserved, from its general relinquishment of claims north and west of the Greeneville Treaty Line, certain areas described therein, and the Indians relinquished their claims to these areas in the same article. Interests in these areas have been claimed by several of the plaintiffs herein.[14] To enumerate [189] the claimants to each of these areas is unnecessary. Each area will be discussed separately hereinafter. Where the claim of any particular plaintiff warrants special consideration, reference will be made accordingly.

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[14] We have entered no findings relating to the lands described in the third clause of the first paragraph of Article IV of the Treaty. These lands are impossible to define. They are not at issue in these proceedings.

16. *Royce Area 12 Ohio.* This area, which adjoins the northern boundary line of western Royce Area 11 in Shelby County, Ohio, is described in the treaty as "[o]ne piece of land six miles square at or near Loromie's store." Loromie's store was a trading center established in the late 1760's by Peter Loromie, a French-Canadian Tory who, during the revolution, supplied anti-American Indians. During George Rogers Clark's expedition against the Shawnee villages on the upper Great Miami and Mad Rivers in 1782, a detachment of his forces destroyed the post, after which this area ceased to have any independent significance.

Not far to the south (within Royce Area 11) at the mouth of Loramie Creek was the site of the early Miami village of Pickawillany, which was settled in 1747 or 1748, and was inhabited by La Demoiselle's band of Miamis until 1752, when a French-led force of Ottawas destroyed it and the Miamis fled. Some years later, when the Shawnees moved west to the upper Great Miami during the early years of the American Revolution, there was a thick concentration of Shawnee settlements within Royce Area 11 south of Royce Area 12. By the late 1780's, however, the Shawnees had evacuated western Royce Area 11 and moved north and west.

[190] This enclave is not known to have contained settlements of any tribe. During the lengthy period that Loromie's store was located there, Indians of various tribes passed in and out of this area. There is nothing in the record to differentiate Indian use and occupancy here from that of adjoining western Royce Area 11.

17. *Royce Area 13 Ohio.* This area is located approximately 15 miles north of Royce Area 12 and is described in the Greeneville Treaty as "[o]ne piece two miles square at the head of the navigable water or landing on the St. Mary's river, near Girty's town." It was the site of a trading post established in 1783 by James Girty, a British trader married to a Shawnee woman. There was

also an Indian village at the site at the same time which may have been Shawnee, but this cannot be confirmed. Girty remained there until 1790. There are reports of Shawnees hunting in the general area of Royce Areas 12 and 13 in 1794. The proximity of this enclave to western Royce Area 11 was such that Indian use and occupancy of it may be considered together with that of the nearby portions of western Royce Area 11.

18. *Royce Area 14 Ohio.* This area, located in western Ohio about 20 miles north of the Greeneville Treaty Line is described in the Greeneville Treaty as "[o]ne piece six miles square at the head of the navigable water of the Au-Glaize river." The tract was the location of Fort Amanda. The entire eastern boundary of Royce Area 14 is adjacent to the western boundary of Royce Area 166, which was granted to the Shawnees by the sixth section of the Treaty of September 29, 1817, 7 Stat. 160, [191] and one-half of its southern boundary is adjacent to Royce Area 165, also granted to the Shawnees by the same treaty. The area was relatively close to the Shawnee settlements in Royce Area 11 in the late 1770's and early 1780's. However, up to the time of the 1795 Greeneville Treaty, there is no evidence in the record to substantiate exclusive use and occupancy of this area by any particular tribe.

19. *Royce Area 15 Ohio.* This area in northwestern Ohio was described in the 1795 Treaty of Greeneville as "[o]ne place six miles square at the confluence of the Au-Glaize and Miami rivers, where Fort Defiance now stands." The area was a popular location for winter hunting in the mid-18th century because a salt lick there attracted large numbers of buffalo. Later, from about 1774 to 1776, there are reports of an Ottawa village at this location. In 1794 there were congregated there, according to a captive of Wayne's, several hundred Delawares, Miamis and Shawnees who had been, until shortly before, settled near Fort Wayne. This mixed settlement was evacuated in the same year due to fear of imminent attack by United States forces under General Wayne. This settlement was not permanent but was, rather, a launching point for Indian attacks against the Americans. There is no evidence to support claims of exclusive use and occupancy of this area by any particular tribe.

20. *Royce Area 16 Indiana.* This area, located in northeastern Indiana, is described in the Greeneville Treaty as "[o]ne piece six miles square at or near the confluence of the rivers St. Mary's and St. Joseph's, where Fort Wayne now stands, or near it."

[192] The Miamis had established a village here called "Kekionga" early in the 18th century after they had left Detroit. They remained continuously at Kekionga until about 1792. In the late 1780's, large numbers of Delawares and Shawnees, evacuating Royce Area 11, had joined the Miamis at and around Kekionga. In 1790 General Harmar's forces burned Kekionga. The site of the village was reoccupied by the Indians shortly thereafter, but was evacuated in 1792 when most of the Miamis, along with the Delawares and Shawnees in the area, moved east to the vicinity of Royce Area 15 Ohio. The rest of the Miamis evacuated westward. The abandonment of Kekionga by the Indians was the result of American pressure, which at this time was forcing the Indians of various tribes and settlements to group together for security purposes. Before the 1795 Treaty of Greeneville this area was Miami territory, although later, in the early 19th century, there were Potawatomis inhabiting the area north of the Wabash. *See Miami Tribe* v. *United States,* Docket 67, 2 Ind. Cl. Comm. 617, 625 (1954), *aff'd in part, rev'd in part,* 146 Ct. Cl. 421 (1959).

21. *Royce Area 17 Indiana.* This area is located in eastern Indiana and is described in the treaty as "[o]ne piece two miles square on the Wabash River at the end of the portage from the Miami of the lake, and about eight miles westward from Fort Wayne." The discussion in the immediately preceding finding of fact No. 20 relates equally to this area. At the 1795 Greeneville Treaty proceedings, General Wayne acknowledged Miami control

over this area. This area was apparently evacuated at the same time Royce Area 16 was.

[193] 22. *Ouatanon or the Old Wea Towns.* This area in west-central Indiana is described in the 1795 Greeneville Treaty as "'[o]ne piece six miles square at the Ouatanon or old Wea towns on the Wabash river." The French had established a fort there around 1720, near the site of a village occupied by Weas, a branch of the Miami Tribe. This village and others nearby were occupied until 1790 when they were destroyed by an American force. This area is bordered on three sides by Royce Area 99, ceded by the Miamis at the Treaty of October 6, 1818, 7 Stat. 189. This area has been previously held to be within the area of occupancy of the Weas who, at the time of the 1795 Greeneville Treaty, were a part of the Miami Tribe. *See Miami Tribe, supra,* at 627-28. This area was, however, relinquished by the United States in the Treaty of September 30, 1809, 7 Stat. 113, and was subsequently receded to the United States, as part of Royce Areas 98 and 99, in the Treaties of October 2, 1818, between the United States and the Weas and October 6, 1818, between the United States and the Miamis, 7 Stat. 189. The Wea Nation has been compensated for most of this area as part of Royce Area 99. *See Peoria Tribe* v. *United States,* Docket 314, 9 Ind. Cl. Comm. 274 (1961). The small portion north of the Wabash River is included within the claim of the Peoria Tribe on behalf of the Wea Nation in Docket 314-A before this Commission. *See Pottawatomie Tribe* v. *United States,* Dockets 15-D, *et al.,* 30 Ind. Cl. Comm. 42 (1973).

23. *Royce Areas 18 and 19 Ohio.* These two areas, adjacent to each other, are located in northwestern Ohio on the Maumee River, near the present city of Toledo. They are described in the 1795 Greeneville Treaty as follows:

> [194] . . . (8) One piece twelve miles square at the British fort on the Miami of the lake at the foot of the rapids. (9) One piece six miles square at the mouth of the said river where it empties into the Lake.

The former area includes the site of the Battle of Fallen Timbers. The latter area is the site of Fort Industry.

In the early 18th century Weas and Miamis lived along the lower Maumee River. By 1750, Ottawas from Detroit were beginning to occupy the lower Maumee River region. It is known that in 1750 Ottawas were planning to establish a settlement at Roche de Boeuf within Royce Area 18. There were definitely recorded Ottawa settlements here beginning in 1763 which continued in existence up to the time of the Greeneville Treaty. *See Dominic ex rel. Ottawa Tribe of Indians* v. *United States,* Docket 40-B, *et al.,* 2 Ind. Cl. Comm. 461, 466 (1953). There are also reports of Wyandots hunting here in the late 18th century.

After 1790 and up to the Battle of Fallen Timbers, Royce Area 18 became a major center for British distribution of supplies to anti-American Indians who were then occupying the area in substantial numbers. During this time, the British constructed Fort Miami on the tract, and, before Fallen Timbers, about 3,000 diverse Indians of the Delaware, Shawnee and Miami Tribes were camped here and were entirely dependent upon British aid. Ottawas continued to live on the Maumee River from 1795 until the 1830's, when they ceded their reserves adjoining Royce Areas 18 and 19 in the Treaties of August 30, 1831, 7 Stat. 359, and February 18, 1833, 7 Stat. 420.

At the time of the 1795 Greeneville Treaty, those bands and groups of Ottawas known as the Ottawas of the Maumee, Blanchard's Fork, AuGlaize [195] and Roche de Boeuf were using and occupying this area and had been doing so for a long time. Use and occupancy by other Indians was short lived.

24. *Area About Fort Sandusky.* This unsurveyed area on Lake Erie in northern Ohio is located at the north-

western corner of Royce Area 53, which latter area was ceded by the Wyandots, Ottawas, Chippewas, Munsees and Delawares, Shawnees and Potawatomis in the Treaty of July 4, 1805, 7 Stat. 87. It is described in the 1795 Greeneville Treaty as "[o]ne piece six miles square upon Sandusky Lake, where a fort once stood." This tract was later found to be within Connecticut's Western Reserve and, therefore, was never surveyed. During the period 1737 to 1748 a group of Wyandots had a village here, which also included some Mingoes and other Indians. Wyandots returned to this general region in the early 1750's and remained, more or less continuously, until after the 1795 Greeneville Treaty. There were also two bands of Ottawas settled in this area from 1784 to 1811. At the time of the 1795 Greeneville Treaty, the Wyandots had used and occupied this area for a long time. Use and occupancy by other tribes was with the permission of the Wyandots.

25. *Royce Area 20 Ohio.* This area in northern Ohio on the Sandusky River a few miles from its mouth is described in the Greeneville Treaty as "[o]ne piece two miles square at the lower rapids of Sandusky River." There was a Wyandot village here as early as 1760, and there is [196] documentation of this settlement down to 1794. This was the center of Wyandot activity from the mid-18th century until after the Treaty of Greeneville. At the time of the 1795 Greeneville Treaty, the Wyandots had used and occupied this area for a long time.

26. *Detroit and Surrounding Area.* This area, comprising approximately 288,000 acres, is described in the Greeneville Treaty as follows:

> . . . (12) The post of Detroit and all the land to the north, the west and the south of it, of which the Indian title has been extinguished by gifts or grants to the French or English governments; and so much more land to be annexed to the district of Detroit as shall be comprehended between the river Rosine on the south, lake St. Clair on the north, and a line, the general course whereof shall be six miles distant from the west end of Lake Erie, and the Detroit River.

The Detroit area ceded at Greeneville in 1795 is entirely surrounded (except for water) by Royce Area 66, which was ceded to the United States at the Treaty of November 17, 1807, 7 Stat. 105, at Detroit, with the Wyandot, Ottawa, Chippewa and Potawatomi Tribes, and which is the subject of claims by representatives of these tribes in Dockets 59, *et al.*, consolidated, before this Commission.

Cadillac established the French trading post at Detroit in 1701. During the period 1710 to 1720, four tribes had settlements around the post of Detroit: Chippewa, Potawatomi, Ottawa and Huron (Wyandot). The Chippewas never established more than an occasional presence within the [197] area ceded at Greeneville in 1795. Chippewa activity was centered during the 18th century to the north around Saginaw Bay. The Ottawas occupied a village at Detroit until 1763 when, after the failure of Pontiac's seige of Detroit, the Ottawas moved south into the Maumee River area of Ohio. The Potawatomis had continuously occupied a village site within the ceded area from 1710 until approximately 1764. After Pontiac's uprising, however, the Potawatomis abandoned this village and moved westward, outside the ceded area but within Royce Area 66.

The Wyandots maintained a settlement almost continuously within the ceded area from about 1705 until 1742 when they moved their settlement across the Detroit River into present day Ontario. While there are references to Wyandot presence within the ceded area after 1742, these references are brief, and the main Wyandot settlement apparently remained in Ontario until 1777, when the Wyandots established two village sites at present Wyandotte and Gibraltar, Michigan, where they remained until at least 1796.

Beginning shortly after Cadillac's settlement of Detroit, whites were granted lands adjacent to the fort. Later, several tracts of land within the area ceded were sold or granted by Indians to settlers. By 1788, there were approximately 4,000 whites settled on both sides of the Detroit River. The area for several miles around the post of Detroit was farmland.

On the basis of the evidence herein, we are unable to find that the predecessors of any of the claimants herein actually and exclusively [198] used and occupied for a long time any of this area ceded at Greeneville in 1795. We therefore find that no tribes held aboriginal title to any of this area at the time of the 1795 Greeneville Treaty.

27. *Royce Areas 21, 22 and 23 Michigan.* The area identified as Royce Area 21 on Royce's Map of Michigan 1, includes Mackinac Island and the northern tip of lower Michigan at the Straits. Area 22 is the southern tip of the upper Michigan peninsula. Area 23 is the island of Bois Blanc located a few miles east of the Straits. These areas are described as follows in Article III of the Greeneville Treaty:

> . . . (13) The post of Michillimackinac, and all the land on the island, on which that post stands, and the main land adjacent, of which the Indian title has been extinguished by gifts or grants to the French or English governments; and a piece of land on the main to the north of the island, to measure six miles on lake Huron, or the strait between lakes Huron and Michigan, and to extend three miles back from the water of the lake or strait, and also the island De Bois Blanc, being an extra and voluntary gift of the Chippewa nation.

French missionaries settled Mackinac Island in 1670. From 1672 to 1706 a French fort and settlement existed on the north side of the Straits at Point St. Ignace; from 1712 to 1781 the fort and settlement (first French, then British) were located on the south side of the Straits; after 1781 they were removed to Mackinac Island. In conjunction with the removal of the fort and settlement to Mackinac Island, which occurred after American sovereignty had attached, the British commandant purchased the island for 5,000 pounds from a group of Chippewas who conveyed it ". . . in behalf of ourselves and all others of our nation, [199] the Chipwas, who have or can lay claim to the . . . island." *See Indian Treaties and Surrenders,* Vol. I, No. 1; Def. Ex. S-78. Chippewas had been reported on Mackinac Island in 1779, but both Ottawas and Chippewas frequented the trading post and agencies there after 1781. Ottawas and Chippewas from Detroit ceded Bois Blanc Island in 1786; Chippewas gave it to the United States at the 1795 Greeneville Treaty, but Ottawas claimed it in 1799. The British retained possession of Mackinac until 1796 despite their relinquishment of the entire northwest under the terms of the 1783 Treaty of Paris. The United States finally took possession in 1796 pursuant to a provision of Jay's Treaty, 8 Stat. 116. Subsequently, in 1834, both Ottawas and Chippewas acknowledged the validity of the gift of Bois Blanc Island when they requested some remuneration for it because they were then impoverished.

Royce Areas 21, 22 and 23 were completely surrounded by Area 205, Royce's Map of Michigan 1. In proceedings under Dockets 18-E and 58, consolidated, 7 Ind. Cl. Comm. 576 (1959), this Commission held that Royce Area 205 was aboriginally owned in 1836 by a single entity of Ottawa and Chippewa Indians which entity had been formed at some time after 1795 and before 1836 from autonomous bands of Ottawas and Chippewas who inhabited Royce Area 205.

On the basis of the evidence, we find that in 1795 Royce Areas 21, 22 and 23 were areas of common use and occupancy by autonomous bands of Ottawa and Chippewa Indians. Therefore, we find that no single tribe, [200] band, or group of Indians possessed aboriginal title to these enclaves at the time of the 1795 Greeneville Treaty by virtue of exclusive use and occupancy for a long time.

28. *Royce Area 24 Illinois (Chicago).* This area is described in Article III of the 1795 Greeneville Treaty as "[o]ne piece of land six miles square at the mouth of Chikago river, emptying into the south-west end of Lake Michigan, where a fort formerly stood." The Weas occupied this area early in the 18th century, and it is known that there were Sac and Fox Indians here in the 1740's. According to an 1816 memoir written by Auguste Chocteau, a trader and commissioner at various treaties, Potawatomis, together with some bands of Chippewas and Ottawas, moved to the site of Chicago in 1743 and remained there until at least 1816. *See Citizen Band* v. *United States,* Dockets 71, *et al.,* 27 Ind. Cl. Comm. 187, at 285, n. 13 (1972). At the time of the 1795 Greeneville Treaty, the Potawatomi Tribe had actually and continuously used and occupied this area for a long time. Its use as a portage path by other Indians was permissive.

29. *Mouth of the Illinois River and the "Old Piorias Fort and Village" (Illinois).* These two areas, both of which are intersected by the Illinois River, are described as follows in the treaty:

> . . . (15) One piece twelve miles square at or near the mouth of the Illinois river, emptying into the Mississippi. (16) One piece six miles square at the old Piorias fort and village, near the south end of the Illinois lake on said Illinois river.

[201] During the early 18th century these areas were within the very large territory inhabited and controlled by the Illinois Confederacy, a group of several tribes which included the Peorias and Kaskaskias. Beginning about 1743 the Potawatomis moved into Illinois, and over the remainder of the 18th century extended their use and occupancy of lands there. By approximately 1765 to 1770 the Illinois tribes had been driven south of the Illinois River, and the Potawatomis were using and occupying the portion of Illinois bordering on the north and west of the Illinois River. *See Citizen Band* v. *United States,* Dockets 217, *et al.,* 11 Ind. Cl. Comm. 641, 655-58 (1962); *Sac and Fox Tribe* v. *United States,* Docket 83, 7 Ind. Cl. Comm. 675, 694-96 (1959). On the south side of the Illinois River, the Kickapoo had, beginning around 1735, established themselves in the area of central Illinois described as Royce Area 110 on Royce's Map of Illinois 2. This area adjoined the portions of these two enclaves located south and east of the Illinois River. The Illinois Indians receded before these stronger tribes to southern Illinois along the Mississippi and Ohio Rivers where they remained until after 1795. *See Pottawatomie Tribe* v. *United States,* Dockets 15-D, *et al.,* 30 Ind. Cl. Comm. 42, 88-92 (1973).

We find that at the time of the 1795 Greeneville Treaty, the Potawatomi Tribe possessed aboriginal title to the portions of these two enclaves located north and west of the Illinois River. We further find that, with respect to those portions of these enclaves located south and east of the Illinois River, the Kickapoo Indians possessed aboriginal title in 1795. These Indians had, at the time of the 1795 Greeneville Treaty, actually and exclusively used and occupied [202] these respective portions of the two enclaves continuously and for a long time.

30. *Rights of Passage.* In the last paragraph of Article III of the treaty, the Indians granted the United States rights of free passage along certain routes on the Indian side of the Greeneville Treaty Line. The language granting these rights of passage is quoted in finding of fact No. 3, *supra.* The granting of these rights of passage did not constitute cessions of the lands over which these easements passed. *See* 27 Ind. Cl. Comm. 59, at 67, n. 1. However, while the cession of these lands took place in later treaties with the United States, the grants of passage were grants of valuable property rights by those Indians who may have possessed title to the lands over which passage was granted.

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There are five separate passages described in the last paragraph of Article III of the treaty. The courses of these rights-of-way are nearly all over the waters of navigable rivers. The portions which traverse land are:

1) That portion of the first described passage running from Loromie's store (Royce Area 12, Ohio) to the St. Mary's River (the portage path meets the St. Mary's River within Royce Area 13, Ohio). This portion traverses the southwest corner of Royce Area 87 for approximately six miles. Royce Area 87 was ceded to the United States in the Treaty of September 29, 1817 (7 Stat. 160), by representatives of the [203] Wyandot, Seneca, Delaware, Shawnee, Potawatomi, Ottawa and Chippewa Tribes of Indians and is the subject of claims in Dockets 13-F, *et al.,* consolidated, before this Commission.

2) That portion of the second described passage running from Loromie's store (Royce Area 12, Ohio) to the Auglaize River at a point within Royce Area 14. This passage includes the portage between Royce Areas 12 and 13 described above and then proceeds through Royce Area 87 for a distance of approximately nine miles to Royce Area 14.

3) That portion of the third described passage running from Loromie's store (Royce Area 12) to the Sandusky River. While difficult to trace on land, this passage most probably proceeded across south-central Royce Area 87 for a distance of approximately 60 miles.

4) That portion of the fourth described passage running from Royce Area 24, Illinois 2, to the Illinois River. This portion traverses the northeastern portion of Royce Area 78, Illinois 2, for a distance of approximately seven miles. Royce Area 78 was ceded to the United States in the Treaty of August 24, 1816, 7 Stat. 146, by the United Tribes of Ottawas, Chippewas and Potawatomis and is the subject of claims in Docket 13-K, *et al.,* consolidated, before this Commission.

5) That portion of the fifth described passage running from Fort Wayne (Royce Area 16) to the Wabash River. This portion traverses the boundary line between Royce Areas 132 and 99, Map of Indiana (Detail) for approximately two miles. Royce Area 132 was ceded to the United States [204] in the Treaty of October 16, 1826, 7 Stat. 295, by the Potawatomi Tribe of Indians and is the subject of claims in Docket 15-N, *et al.,* consolidated, before this Commission. The Commission has previously determined that, by virtue of the 1795 Greeneville Treaty together with the Treaty of October 6, 1818, 7 Stat. 189, the Miami Tribe held recognized title to the portion of Royce Area 99 adjoining this passage. *See Miami Tribe* v. *United States,* Dockets 67, *et al.,* 2 Ind. Cl. Comm. 617, 629 (1954), *aff'd in part, rev'd in part,* 146 Ct. Cl. 421 (1959)

The Commission finds as follows with respect to the passage described above:

A) On the basis of our findings relating to Royce Areas 12, 13 and 14 in Ohio, we find that no tribes possessed aboriginal title to those portions of the first and second passages described in clauses 1 and 2, *supra,* of this finding of fact.

B) The passage described in clause 3, *supra,* of this finding of fact passed over the southeastern portion of Royce Area 87 which, at the time of the 1795 Greeneville Treaty, was used and occupied by several different Indian groups. The evidence presented in Dockets 13-F, *et al.,* consolidated, before this Commission, portions of which are by the accompanying order made a part of the record of these proceedings, establishes that, although the Wyandots were predominant in this region, there had been Delawares, Munsees and Mingoes using and occupying the region for at least fifteen years before the 1795 Treaty of Greeneville. We therefore find that in 1795 no tribes possessed aboriginal title to that portion of the third passage described in clause 3, *supra,* of this finding of fact.

[205] C) On the basis of our findings of fact relating to Royce Area 24 in Illinois, the passage described in clause 4, *supra*, of this finding passed over territory aboriginally owned in 1795 by the Potawatomi Tribe.

D) On the basis of our findings of fact relating to Royce Areas 16 and 17, Indiana, the passage described in clause 5, *supra*, of this finding passed over territory aboriginally owned in 1795 by the Miami Tribe.

31. *Royce Area 25 Indiana (Clark's Grant).* Royce Area 25, also known as Clark's Grant, is an area of 150,000 acres located in present day Clark, Scott and Floyd Counties in southern Indiana. This area is described in Article IV, subsection 1, of the treaty as:

> The tract of one hundred and fifth thousand acres near the rapids of the river Ohio, which has been assigned to General Clark, for the use of himself and his warriors.

This area is adjacent to Royce Area 56 on the north, east and south and to Royce Area 49 on the southwest. The Ohio River is the southern boundary of Royce Area 25. The claimants to this area in these proceedings are the plaintiffs in Docket 27-B, the Delaware Tribe of Indians; in Docket 130, Ira Sylvester Godfroy, *et al.*, *ex rel.*, the Miami Indian Tribe; in Docket 252, the Miami Tribe of Oklahoma, *et al.*; and two of the plaintiffs in Docket 338, the Absentee Delaware Tribe of Oklahoma and the Peoria Tribe of Indians of Oklahoma on behalf of the Wea and Piankeshaw Nations.

On December 10, 1777, the Virginia House of Delegates authorized Virginia Governor Patrick Henry to send troops of the Virginia militia on an expedition to reduce the British posts in the country beyond the [206] Ohio River. In May 1779, the Virginia legislature passed an act which, *inter alia*, provided that

> . . . [e]very soldier who enlisted into the corps of volunteers commanded by colonel George Rogers Clarke, and continued therein till the taking the several posts in the Illinois country, shall at the end of the war, be entitled to a grant of two hundred acres of any unappropriated lands within this commonwealth. . . [Laws of Va., Ch. VI (1779); Def. Ex. S-29, at 26.]

Subsequently in 1779, after Clark and his men had captured Vincennes from the British, Clark refused an offer by the Indians there of a gift of land made to encourage him to remain as their "Chief and Guardian." Soon after, however, Clark accepted the gift of the tract in a deed subscribed by the Piankeshaw chief Francis son of Tobacco, who made the gift ". . . in the names of all the Great Chiefs and Warriors of the Ouabash and their allies." Clark accepted the gift, not for himself, since he knew that Indian lands could not be transferred to individuals, but as the possible site for a fort. *Coll. Ill. Hist. Lib., Va. Ser.*, Vol. III, at 151-53; Def. Ex. S-21.

As one of the conditions of the cession of its land claims northwest of the Ohio River to the States of the Confederation, Virginia, by its deed of March 1, 1784, stipulated

> . . . [t]hat a quantity not exceeding one hundred and fifty thousand Acres of Land promised by this State shall be allowed and granted to the then Colonel now General George Rogers Clarke and to the Officers and Soldiers of his Regiment who marched with him when the posts of Kaskaskies and St. Vincents were reduced and to the Officers and Soldiers that have been since incorporated into the said Regiment to be laid off in one Tract the length of which not to exceed double the breadth in such place on the North-West Side of the Ohio as a majority of the Officers shall choose and to be afterwards divided among the said Officers and Soldiers in due proportion according to the Laws of Virginia. [*Terr. Papers of the U.S.*, Vol. II, at 8; Def. Ex. S-20.]

[207] Prior to the relinquishment of Virginia's claims, the Virginia legislature had authorized the surveying and apportionment of these lands and the establishment of a town therein, and the Virginia legislature continued periodically up until 1796 to enact laws regarding Clark's Grant, despite the fact that Virginia had ceded its claims to lands northwest of the Ohio River in 1784.

We find, for the reasons set forth in our opinion, that the United States acquired title to Clark's Grant in 1784 when Virginia ceded its claims to the United States, and that the United States held the right of preemption with respect to Clark's Grant until 1795 when the Indians at Greeneville ceded their rights to Clark's Grant to the United States. We are, however, unable to find aboriginal title in any of the claimants herein. There is no evidence in the record to establish actual and exclusive use and occupancy over a long period of time by the aboriginal predecessors of any of these claimants sufficient to establish proof of aboriginal title to Clark's Grant or any portion thereof.

32. *Royce Area 26 (Vincennes Tract).* This area is described in Article IV, subsection 2, of the 1795 Greeneville Treaty as "[t]he post of St. Vincennes on the river Wabash and the lands adjacent of which the Indian title has been extinguished." The boundaries of the Vincennes Tract were formally determined for the first time in the Treaty of June 7, 1803, 7 Stat. 74, between the United States and representatives of the Delaware, Shawnee, Potawatomi, Miami, Eel River, Wea, Kickapoo, Piankeshaw [208] and Kaskaskia Indians, in the following terms:

> ARTICLE 1st. Whereas it is declared by the fourth article of the treaty of Greeneville, that the United States reserve for their use the post of St. Vincennes and all the lands adjacent to, which the Indian titles had been extinguished. *And whereas*, it has been found difficult to determine the precise limits of the said tract as held by the French and British governments: it is hereby agreed, that the boundaries of the said tract shall be as follows: Beginning at Point Coupee on the Wabash, and running thence by a line parallel to the general course of the Wabash, until it shall be intersected by a line at right angles to the same, passing through the mouth of White river, thence by the last mentioned line across the Wabash and towards the Ohio, seventy-two miles, thence by a line north twelve degrees west, until it shall be intersected by a line at right angles to the same, passing through Point Coupee, and by the last mentioned line to the place of beginning.

Most of this tract lies within the present-day boundaries of the State of Indiana, and a portion lies within Illinois. The tract is bounded on the south and east by Royce Area 49, on the northeast by Royce Area 56, on the west by Royce Area 63, and on the north by Royce Area 71.

Those plaintiffs claiming aboriginal title within Royce Area 26 in these proceedings are the Miami plaintiffs in Dockets 130 and 252, the Delaware plaintiffs in Dockets 27-B and 338, the Kickapoo plaintiffs in Docket 338, the Peoria plaintiffs on behalf of the Piankeshaw Nation in Docket 338, and the Hannahville (Potawatomi) plaintiffs in Docket 29-C.

[209] The Commission has heretofore determined that the Piankeshaw and Delaware held recognized title to Royce Area 49 to the south of Vincennes Tract (19 Ind. Cl. Comm. 107, 124); that the Piankeshaw held recognized title to Royce Area 63 to the west (16 Ind. Cl. Comm. 574, 592); and that the Miami, Eel River and Wea held recognized title to Royce Areas 56 and 71 to the east and north (5 Ind. Cl. Comm. 180, 197). The Commission has also previously determined that the Potawatomi and Kickapoo had no interst in Indiana land south and east of the Wabash River (2 Ind. Cl. Comm. 617, 631-33) and that the northern boundary of Royce Area 63, which

was an extension of the northern boundary of the Vincennes Tract, correctly delineated the boundary between the Piankeshaw and the Kickapoo claims (16 Ind. Cl. Comm. 574, 590).

At the 1795 Treaty of Greeneville, the Indian signatories acknowledged that their claims to certain lands around Vincennes had been extinguished prior thereto. Eight years later at the 1803 Fort Wayne Treaty, the Indians again acknowledged this fact and agreed that the boundaries of the area, their claims to which had been extinguished before Greeneville, would be as described in that treaty. The evidence herein indicates that the Indians at Greeneville in 1795 did not contest the prior extinguishment of their claims to the area around Vincennes. Furthermore, although the evidence indicates that in the proceeding leading up to the 1803 Fort Wayne Treaty the Indians did at first protest [210] the extent of the prior extinguishment (which protest Governor Harrison after investigation agreed with), the Indians did ultimately agree that the area described in the first article of the Fort Wayne Treaty was the area which would be considered equivalent to that area described in the 1795 Greeneville Treaty. In the 1803 Treaty of Fort Wayne, the Indians received no additional consideration in connection with the determination of the boundaries of the Vincennes Tract other than a reaffirmance of the relinquishment by the United States, at Greeneville in 1795, of claims to surrounding areas.

We find, therefore, that the area described in the 1803 Fort Wayne Treaty constitued the boundaries of the area reserved by the United States as the "post of St. Vincennes . . . and the land adjacent, of which Indian title has been extinguished" in Article IV of the 1795 Greeneville Treaty. We find further that the Indians at the 1795 Greeneville and 1803 Fort Wayne Treaties acknowledged that any claims they may have had to this area extinguished prior to 1795. Finally, we find that no tribes possessed aboriginal title to the Vincennes Tract at the time of the 1795 Greeneville Treaty.

33. *Royce Area 27 (Ft. Massac, Illinois).* This area was described in Article IV, subsection 4, of the 1795 Greeneville Treaty as "[t]he post of Fort Massac towards the mouth of the Ohio." This area is located on the Ohio River in present day Massac County, Illinois, a few miles downriver and opposite from Paducah, Kentucky. Its acreage is undetermined but is quite small. Fort Massac was established by the French [211] between 1708 and 1711 and was occupied by them until 1765 when the fort was surrendered to the British. The British abandoned it during the American Revolution, and George Rogers Clark briefly occupied the site in 1778 during his raid into Illinois.

Royce Area 27 is completely surrounded (except for the Ohio River) by Royce Area 48, Map of Illinois 1, which was ceded to the United States in the Treaty of August 13, 1803, 7 Stat. 78, by the Kaskaskia Tribe, representing itself and the Mitchigamia, Cahokia and Tamoroi Tribes. The Kaskaskia Tribe subsequently became a part of the Peoria Tribe of Indians of Oklahoma, plaintiffs in Docket 338, who are the only claimants to this area. The recognized title claim of the Peoria Tribe on behalf of the Kaskaskias to Royce Area 48 has recently been decided by the Commission. *See Pottawatomie Tribe* v. *United States*, Dockets 15-D, *et al.*, 30 Ind. Cl. Comm. 42 (1973).

Evidence of use and occupancy of Royce Area 48 has been submitted in said Docket 313 in proceedings before the Commission. That evidence which has been admitted into evidence herein by the Commission's accompanying order, together with the evidence herein filed by the Peoria plaintiffs, establishes actual and exclusive use and occupancy by the Kaskaskias of the portion of Royce Area 48 adjoining Fort Massac during the entire 18th century. Despite the steadily declining numbers of Kaskaskias during this period, there is documentation of Kaskaskia presence within southern Royce Area 48 until after 1795, and Kaskaskia rights to this area were

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not contested by other Indians. We find, [212] therefore, that as of the time of the 1795 Greeneville Treaty, the Kaskaskia Tribe possessed aboriginal title to Royce Area 27. In addition, in our finding of fact No. 14, *supra,* we have found that the Kaskaskia Tribe was present and signed the Greeneville Treaty.

34. *Indian Locations in the 18th Century.*

a. *Potawatomis.* The Potawatomis are generally believed to have been living in the lower peninsula of Michigan in the 17th century. They moved slowly south from the Green Bay area of Michigan and Wisconsin. By 1700, they established themselves on the Milwaukee River, at Chicago, and on the St. Joseph River in southern Michigan and northern Indiana, and extended their settlements east over southern Michigan as far as Lake Erie. They conquered the Illinois Indians about 1740 and took possession of much of northern Illinois. They also moved south down the Wabash River, their settlements intermingling with the Miamis in that area. *See Citizen Band* v. *United States,* Dockets 71, *et al.,* 27 Ind. Cl. Comm. 187, 253 (1972). The Potawatomis did not use and occupy Royce Area 11 during the 18th century.

b. *Ottawas.* During the 18th century, the Ottawa Indians were scattered in independent bands or groups over an immense territory in the area of the Great Lakes, particularly in Michigan. There were Ottawas at L'Arbre Croche and in other parts of the northwestern section of the lower peninsula of Michigan, on the Grand River in western Michigan, on the St. Joseph River in southwestern Michigan, at Mackinac and at Detroit. Beginning about 1763, Ottawas from Michigan settled on the [213] Maumee River in northwestern Ohio. *See Red Lake Band* v. *United States,* Dockets 18-E, *et al.,* 7 Ind. Cl. Comm. 576, 577-8 (1959); *Ottawa Tribe* v. *United States,* Dockets 40-B, *et al.,* 2 Ind. Cl. Comm. 461, 463-4 (1953). Bands of Ottawas hunted periodically within northeastern Royce Area 11 during the 18th century and had settlements there for short intervals around mid-century.

c. *Chippewas.* The Saginaw Band of Chippewas lived in the northeastern portion of the lower peninsula of Michigan during the 18th century. Chippewas were also present at Mackinac and on Michigan's northern peninsula. *See Red Lake Band* v. *United States, supra,* at 577-8; *Ottawa Tribe* v. *United States, supra,* at 463-4. Groups of Chippewas also hunted periodically within the northeastern portion of Royce Area 11 during the latter half of the 18th century.

d. *Miamis.* During the 18th century the Miamis were located in Indiana with their principal settlements at or near Fort Wayne. In the late 1740's small groups of Miamis established short-lived settlements in western Royce Area 11. After 1755 there are few references to Miami presence in Royce Area 11. There is documentation of occasional Miami hunting in western Royce Area 11 later in the 18th century but other Indians were also present there during the same period. The Weas, who were a part of the Miami Tribe during the 18th century, lived in Indiana to the west of the Miamis at that time.

e. *Wyandots.* In early 18th century, the Wyandots lived near Detroit. Around 1740, they left Detroit. Most went across the Detroit River to present-day Ontario where they remained until 1777 when they]214] returned to form two settlements near Detroit. Others went to the Sandusky River region in northern Ohio about 1740. There were Wyandots settled in southeastern Royce Area 11 on the Muskingum River for a short time around 1750 but, in 1752, they returned to the Sandusky River. Wyandots hunted periodically for the remainder of the century east of the Cuyahoga River in northeastern Royce Area 11 and in central Royce Area 11 along the headwaters of the Scioto River. The areas within Royce Area 11 where the Wyandots hunted were used and occupied by other Indians at the same time.

f. *Delawares.* At the beginning of the 18th century, the Delawares were in Pennsylvania. They began migrating west into Ohio in the 1740's. Delawares, at that time settled on the upper Muskingum River and its tributaries in southeastern Royce Area 11 and remained there until the early 1780's when they were driven north and west out of Royce Area 11 by American forces. For a short time around 1760 there were also Delaware settlements in northeastern Royce Area 11 but these were abandoned about 1763. The record does not support a finding that the Delawares hunted exclusively in the territory to the south and east of their settlements towards the Ohio River.

g. *Shawnees.* In the early 18th century, the Shawnees were located east and south of the Ohio River. In the late 1730's they formed a settlement at the point in central Royce Area 11 where the Scioto River empties into the Ohio River. In 1758 they abandoned the lower Scioto region and moved upriver to the Pickway Plains area near present-day Circleville. This area was the center of Shawnee activities [215] until the late 1770's when they were driven west by American forces. During the period several Shawnee towns existed along middle Scioto River. In 1778 the Shawnees were forced west to the Great Miami River where they lived until forced out of Royce Area 11 altogether by the Americans in the late 1780's. During the 1760's and 1770's they hunted, as did other Indians, along the Ohio River in southern Royce Area 11.

h. *Mingoes.* The first Iroquois to settle permanently in Ohio were those Senecas, and other Iroquois, who moved to the Cuyahoga River about 1742. After that, Mingeos lived at various places throughout Ohio over the remainder of the 18th century, often in small groups in the villages of other tribes. Mingoes had a town on the Ohio River near present-day Steubenville until about 1770 when the occupants moved west to the upper tributaries of the Scioto, where they remained throughout the American revolution. Mingoes hunted along the Ohio River throughout the latter half of the 18th century and are also known to have hunted in eastern Royce

Area 11 during the same period. At the end of the 18th century the Mingoes were congregated in northern Ohio where they became known as the Senecas of Sandusky.

i. *Kaskaskias.* The Kaskaskias, during the 18th century, were a part of the Illinois Confederacy, a group of several tribes. They were driven into southern Illinois during the mid-18th century by the Potawatomis and Kickapoos. During the latter half of the 18th century they lived in southern Illinois along the Ohio River. [216] j. *Kickapoos.* Kickapoo Indians lived in the portion of central Illinois south of the Illinois River during most of the 18th century.

CONCLUSIONS OF LAW

1. Each and all of the plaintiffs in the claims under the dockets involved in these consolidated proceedings are entitled to maintain their respective claims under the Indian Claims Commission Act, 60 Stat. 1049.

2. The claims of James Strong, *et al.*, as the representatives and on behalf of all members by blood of the Chippewa Tribe of Indians, in Docket 13-G; the Red Lake Band, *et al.*, in Docket 18-M; and Robert Dominic, *et al.*, on behalf of the Ottawa Tribe of Indians, in Docket 40-F, are not supported by the evidence herein and, accordingly, should be dismissed.

3. The claim of the Six Nations, *et al.*, in Docket 89, to lands within Royce Area 11 is not supported by the evidence. All other claims in Docket 89 have previously been found to be without merit. *See* 30 Ind. Cl. Comm. 8, 26 (1973), and 30 Ind. Cl. Comm. 337, 357 (1973). Therefore, Docket 89 should be dismissed.

4. As of 1795, the Delaware Tribe, represented in these proceedings by the Delaware Tribe of Indians in Docket 27-B, and the Absentee Delaware Tribe of Oklahoma, *et al.*, in Docket 338, possessed aboriginal title to that portion of Royce Area 11 included within the present-day counties of Tuscarawas, Coshockton and Muskingum, in southeastern Ohio.

[217] 5. As of 1795, the Shawnee Tribe, represented in these proceedings by the Shawnee Tribe of Indians of Oklahoma, *et al.*, in Docket 64, and the Eastern Shawnee Tribe of Oklahoma, *et al.*, in Dockets 335 and 338, possessed aboriginal title to that portion of Royce Area 11 circumscribed by a line beginning at the town of Highland in northern Highland County, Ohio, thence easterly in a straight line to the city of Athens, in Athens County, Ohio, thence in a northwesterly direction up the Hocking River to the town of Lancaster, thence northeasterly in a straight line to a point on the South Fork of the Licking River, 4-½ miles southwest of the City of Newark in Licking County, Ohio, thence west on the 40th degree north latitude to a point one mile east of the town of Catawba in northeastern Clark County, Ohio, thence in a straight line south to the place of beginning.

6. As of 1795, the Miami Tribe possessed aboriginal title to Royce Areas 16 and 17 in Indiana and to that portion of the fifth described passage in the last paragraph of Article III of the 1795 Treaty of Greeneville running from Royce Area 16 west to the Wabash River over a distance of approximately two miles. The Miami Tribe is represented in these proceedings by Ira Sylvester Godfroy, *et al., ex rel.*, the Miami Indian Tribe, plaintiffs in Docket 130 and the Miami Tribe of Oklahoma, *et al.*, plaintiff in Docket 252. The Weas, who were part of the Miami Tribe in 1795, are represented here by the Peoria Tribe of Indians of Oklahoma, *et al.*, plaintiffs in Docket 338.

7. As of 1795, those bands or groups of Ottawa Indians known as the Ottawas of the Maumee, Blanchard's Fork, AuGlaize and Roche [218] de Boeuf, represented in these proceedings by the Ottawa Tribe of Oklahoma, *et al.*, plaintiffs in Docket 338, possessed aboriginal title to Ryoce Areas 18 and 19 in Ohio.

8. As of 1795, the Wyandot Tribe, represented in these proceedings by Lawrence Zane, *et al., ex rel.*,

Wyandot Tribe, *et al.*, plaintiffs in Docket 120, possessed aboriginal title to the unsurveyed area near Sandusky, Ohio, delineated by a dotted black line on Royce's Map of Ohio (Fort Sandusky) and to Royce Area 20 in Ohio.

9. As of 1795, the Potawatomi Tribe, represented in these proceedings by the Pottawatomie Tribe of Indians, the Prairie Band of the Pottawatomie Tribe of Indians, *et al.*, plaintiffs in Docket 15-E, the Hannahville Indian Community, *et al.*, plaintiffs in Docket 29-C, and the Citizen Band of Potawatomi Indians of Oklahoma, *et al.*, plaintiffs in Docket 338, possessed aboriginal title to Royce Area 24 (Chicago) in Illinois, to those portions of the areas described in the fifteenth and sixteenth clauses of the second paragraph of Article III of the 1795 Treaty of Greeneville (the mouth of the Illinois River and the "old Piorias fort and village") located north and west of the Ilinois River, and to that portion of the fourth described passage in the last paragraph of Article III of the 1795 Treaty of Greeneville running, for a distance of approximately seven miles, from Royce Area 24 to the Illinois River.

[219] 10. As of 1795, the Kickapoo Tribe, represented in these proceedings by the Kickapoo Tribe of Oklahoma, the Kickapoo Tribe of Kansas, *et al.*, plaintiffs in Docket 338, possessed aboriginal title to those portions of the areas described in the fifteenth and sixteenth clauses of the second paragraph of Article III of the 1795 Treaty of Greenville (the mouth of the Illinois River and the "old Piorias fort and village") located south and east of the Illinois River.

11. As of 1795, the Kaskaskia Tribe, represented in these proceedings by the Peoria Tribe of Indians of Oklahoma, *et al.*, plaintiffs in Docket 338, possessed aboriginal title to Royce Area 27 (Fort Massac) in Illinois.

12. None of the predecessors of any of the plaintiffs in these consolidated proceedings aboriginally owned in

1795 any other portions of the territory ceded to the United States by the tribes signatory to the 1795 Treaty of Greeneville, nor did any of such predecessors possess recognized title to any of said territory as of 1795.

/s/ Margaret H. Pierce
Margaret H. Pierce, Commissioner

/s/ Brantley Blue
Brantley Blue, Commissioner

/s/ Jerome K. Kuykendall
Jerome K. Kuykendall Chairman

/s/ John T. Vance
John T. Vance, Commissioner

/s/ Richard W. Yarborough
Richard W. Yarborough, Commissioner

[220] BEFORE THE INDIAN CLAIMS COMMISSION

(Caption Omitted)

[221] FINAL ORDER DISMISSING THE CLAIMS IN DOCKET 13-G, 18-M AND 40-F AND DISMISSING DOCKET 89, AND INTERLOCUTORY ORDER IN DOCKETS 15-E, 27-B, 29-C, 64, 120, 130, 252, 335 AND 338

Upon the findings of fact, conclusions of law and opinion this day filed herein and which are hereby made a part of this order.

It Is Hereby Ordered that the claims in Dockets 13-G, 18-M and 40-F be, and the same are hereby, dismissed;

It Is Further Ordered that Docket 89 be, and the same is hereby, dismissed; and

It Is Further Ordered that the claims in Dockets 15-E, 27-B, 29-C, 64. 120, 130, 252, 335 and 338, proceed for the purpose of determining the acreage and fair market value as of August 3, 1795, of the lands found herein to have been aboriginally owned by the predecessors of the plaintiffs in these dockets as of said date, the consideration paid by the United States at the 1795 Treaty of Greeneville, 7 Stat. 49, and all other issues bearing upon the question of defendant's liability in the premises.

Dated at Washington, D. C., this 9th day of August 1973.

/s/ Jerome K. Kuykendall, Chairman
/s/ John T. Vance, Commissioner
/s/ Richard W. Yarborough, Commissioner
/s/ Margaret H. Pierce, Commissioner
/s/ Brantley Blue, Commissioner

APPENDIX C

TREATY OF GREENVILLE, 7 Stat. 49, BETWEEN THE WYANDOT, DELAWARE, SHAWNEE, OTTAWA, CHIPPEWA, POTAWATOMI, MIAMI, EEL RIVER, WEA, KICKAPOO, PIANKESHAW AND KASKASKIA TRIBES OF INDIANS AND THE UNITED STATES OF AMERICA

GEORGE WASHINGTON
President Of The United States Of America

To All To Whom These Presents Shall Come, Greting.

Whereas a Treaty of Peace and Friendship between the United States of America and the Tribes of Indians called the Wyandots, Delawares, Shawanoes, Ottawas, Chipewas, Potawatimes, Miamis, Eel River, Weea's, Kickapoos, Piankashaws, and Kaskaskias, was made and concluded on the Third day of August one thousand seven hundred and ninety five by Anthony Wayne, Major General Commanding the Army of the United States, duly authorized thereto, on the one part, and the Sachems and war chiefs of the before mentioned Nations and Tribes of Indians whose names are thereunto signed on the other part; which Treaty is in the form and words following viz:

49 A TREATY OF PEACE

Between the United States of America and the tribes of Indians, called the Wyandots, Delawares, Shawanoes, Ottawas, Chipewas, Putawatimes, Miamis, Eel-river, Waea's, Kickapoos, Piankashaws, and Kaskaskias.

To put an end to a destructive war, to settle all controversies, and to restore harmony and a friendly intercourse between the said United States, and Indian tribes: Anthony Wayne, major-general, commanding the army

of the United States, and sole commissioner for the good purposes above-mentioned, and the said tribes of Indians, by their Sachems, chiefs and warriors, met together at Greeneville, the Head quarters of the said army, have agreed on the following articles, which, when ratified by the President, with the advice and consent of the Senate of the United States, shall be binding on them and the said Indian tribes.

Article I.

Henceforth all hostilities shall cease; peace is hereby established, and shall be perpetuated; and a friendly intercourse shall take place, between the said United States and Indian tribes.

Article II.

All prisoners shall on both sides be restored. The Indians, prisoners to the United States, shall be immediately set at liberty. The people of the United States, still remaining prisoners among the Indians, shall be delivered up in ninety days from the date hereof, to the general or commanding officer at Greeneville, Fort Wayne or Fort Defiance; and ten chiefs of the said tribes shall remain at Greeneville as hostages, until the delivery of the prisoners shall be effected.

Article III.

The general boundary line between the lands of the United States, and the lands of the said Indian tribes, shall begin at the mouth of Cayahoga river, and run thence up the same the portage between that and the Tuscarawas branch of the Muskingum; thence down that branch to the crossing place above Fort Lawrence; thence westerly to a fork of that branch of the great Miami river running into the Ohio, at or near which fork stood Loromie's store, and where commences the portage between the Miami of the Ohio, and St. Mary's river, which is a branch of the Miami, which runs into Lake Erie; thence a westerly course to Fort Recovery, which stands on a branch of the Wabash; then south-westerly in a direct line to the Ohio, so as to intersect that river opposite the mouth of Kentucke or Cuttawa river. And in consideration of the peace now established; of the goods formerly received from the United States; of those now to be delivered, and of the yearly delivery of goods now stipulated to be made hereafter, and to indemnify the United States for the injuries and expenses they have sustained during the war; the said Indian tribes do hereby cede and relinquish forever, all their claims to the lands lying eastwardly and southwardly of the general boundary line now described; and these lands, or any part of them, shall never hereafter be made a cause of pretence, on the part of the said tribes or any of them, of war or injury to the United States, or any of the people thereof.

[50] And for the same considerations, and as an evidence of the returning friendship of the said Indian tribes, of their confidence in the United States, and desire to provide for their accommodation, and for that convenient intercourse which will be beneficial to both parties, the said Indian tribes do also cede to the United States the following pieces of land; to wit. (1.) One piece of land six miles square at or near Loromie's store before mentioned. (2.) One piece two miles square at the head of the navigable water or landing on the St. Mary's river, near Girty's town. (3.) One piece six miles square at the head of the navigable water of the Au-Glaize river. (4.) One piece six miles square at the confluence of the Au-Glaize and Miami rivers, where Fort Defiance now stands. (5.) One piece six miles square at or near the confluence of the rivers St. Mary's and St. Joseph's, where Fort Wayne now stands, or near it. (6.) One piece two miles square on the Wabash river at the end of the portage from the Miami of the lake, and about eight miles westward from Fort Wayne. (7.) One piece six miles square at the Ouatanon or old Weea towns on the Wabash river. (8.) One piece twelve miles square at the British fort on

the Miami of the lake at the foot of the rapids. (9.) One piece six miles square at the mouth of the said river where it empties into the Lake. (10.) One piece six miles square upon Sandusky lake, where a fort formerly stood. (11.) One piece two miles square at the lower rapids of Sandusky river. (12.) The post of Detroit and all the land to the north, the west and the south of it, of which the Indian title has been extinguished by gifts or grants to the French or English governments: and so much more land to be annexed to the district of Detroit as shall be comprehended between the river Rosine on the south, lake St. Clair on the north, and a line, the general course whereof shall be six miles distant from the west end of Lake Erie, and Detroit river. (13.) The post of Michillimackinac, and all the land on the island, on which that post stands, and the main land adjacent, of which the Indian title has been extinguished by gifts or grants to the French or English governments; and a piece of land on the main to the north of the island, to measure six miles on Lake Huron, or the streight between lakes Huron and Michigan, and to extend three miles back from the water of the lake or streight, and also the island DeBois Blanc, being an extra and voluntary gift of the Chipewa nation. (14.) One piece of land six miles square at the mouth of Chikago river emptying into the southwest end of Lake Michigan, where a fort formerly stood. (15.) One piece twelve miles square at or near the mouth of the Illinois river, emptying into the Mississippi. (16.) One piece six miles square at the old Piorias fort and village, near the south end of the Illinois lake on said Illinois river. And whenever the United States shall think proper to survey and mark the boundaries of the lands hereby ceded to them, they shall give timely notice thereof to the said tribes of Indians, that they may appoint some of their wise chiefs to attend and see that the lines are run according to the terms of this treaty.

And the said Indian tribes will allow to the people of the United States a free passage by land and by water, as one and the other shall be found convenient, through their country, along the chain of posts herein before mentioned; that is to say, from the commencement of the portage aforesaid at or near Loromie's store, thence along said portage to the St. Mary's, and down the same to Fort Wayne, and then down the Miami to lake Erie: again from the commencement of the portage at or near Loromie's store along the portage from thence to the river Au-Glaize, and down the same to its junction with the Miami at Fort Defiance: again from the commencement of the portage aforesaid, to Sandusky river, and down the same to Sandusky bay and lake Erie, and from Sandusky to the post which shall be taken at or near the foot of the rapids of the Miami [51] of the lake: and from thence to Detroit. Again from the mouth of Chikago, to the commencement of the portage, between that river and the Illinois, and down the Illinois river to the Mississippi, also from Fort Wayne along the portage aforesaid which leads to the Wabash, and then down the Wabash to the Ohio. And the said Indian tribes will also allow to the people of the United States the free use of the harbours and mouths of rivers along the lake adjoining the Indian lands, for sheltering vessels and boats, and liberty to land their cargoes where necessary for their safety.

Article IV.

In consideration of the peace now established and of the cessions and relinquishments of lands made in the preceding article by the said tribes of Indians, and to manifest the liberality of the United States, as the great means of rendering this peace strong and perpetual; the United States relinquish their claims to all other Indian lands northward of the river Ohio, eastward of the Mississippi, and westward and southward of the Great Lakes and the waters uniting them, according to the boundary line agreed on by the United States and the king of Great-Britain, in the treaty of peace made between them in the year 1783. But from this relinquishment by the United

States, the following tracts of land, are explicitly excepted. 1st. The tract of one hundred and fifty thousand acres near the rapids of the river Ohio, which has been assigned to General Clark, for the use of himself and his warriors. 2d. The post of St. Vincennes on the river Wabash, and the lands adjacent, of which the Indian title has been extinguished. 3d. The lands at all other places in possession of the French people and other white settlers among them, of which the Indian title has been extinguished as mentioned in the 3d article: and 4th. The post of fort Massac towards the mouth of the Ohio. To which several parcels of land so excepted, the said tribes relinquish all the title and claim which they or any of them may have.

And for the same considerations and with the same views as above mentioned, the United States now deliver to the said Indian tribes a quantity of goods to the value of twenty thousand dollars, the receipt whereof they do hereby acknowledge; and henceforward every year forever the United States will deliver at some convenient place northward of the river Ohio, like usefull goods, suited to the circumstances of the Indians, of the value of nine thousand five hundred dollars; reckoning that value at the first cost of the goods in the city or place in the United States, where they shall be procured. The tribes to which those goods are to be annually delivered and the proportions in which they are to be delivered, are the following.

1st. To the Wyandots, the amount of one thousand dollars. 2d. To the Delawares, the amount of one thousand dollars. 3d. To the Shawanese, the amount of one thousand dollars. 4th. To the Miamis, the amount of one thousand dollars. 5th. To the Ottawas, the amount of one thousand dollars. 6th. To the Chippewas, the amount of one thousand dollars. 7th. To the Putawatimes, the amount of one thousand dollars. 8th. And to the Kickapoo, Weea, Eel-river, Piankashaw and Kaskaskias tribes, the amount of five hundred dollars each.

Provided, That if either of the said tribes shall hereafter at an annual delivery of their share of the goods aforesaid, desire that a part of their annuity should be furnished in domestic animals, implements of husbandry, and other utensils convenient for them, and in compensation to useful artificers who may reside with or near them, and be employed for their benefit, the same shall at the subsequent annual deliveries be furnished accordingly.

[52] Article V.

To prevent any misunderstanding about the Indian lands relinquished by the United States in the fourth article, it is now explicitly declared, that the meaning of that relinquishment is this: The Indian tribes who have a right to these lands, are quietly to enjoy them, hunting, planting, and dwelling thereon so long as they please, without any molestation from the United States; but when those tribes, or any of them, shall be disposed to sell their lands, or any part of them, they are to be sold only to the United States; and untill such sale, the United States will protect all the said Indian tribes in the quiet enjoyment of their lands against all citizens of the United States, and against all other white persons who intrude upon the same. And the said Indian tribes again acknowledge themselves to be under the protection of the said United States and no other power whatever.

Article VI.

If any citizen of the United States, or any other white person or persons, shall presume to settle upon the lands now relinquished by the United States, such citizen or other person shall be out of the protection of the United States; and the Indian tribe on whose land the settlement shall be made, may drive off the settler, or punish him in such manner as they shall think fit; and because such settlements made without the consent of the United States, will be injurious to them as well as to the Indians, the United States shall be at liberty to break them up, and remove and punish the settlers as they shall think proper, and so effect that protection of the Indian lands herein before stipulated.

Article VII.

The said tribes of Indians, parties to this treaty, shall be at liberty to hunt within the territory and lands which they have now ceded to the United States, without hindrance or molestation, so long as they demean themselves peaceably, and offer no injury to the people of the United States.

Article VIII.

Trade shall be opened with the said Indian tribes; and they do hereby respectively engage to afford protection to such persons, with their property, as shall be duly licensed to reside among them for the purpose of trade, and to their agents and servants; but no person shall be permitted to reside at any of their towns or hunting camps as a trader, who is not furnished with a license for that purpose, under the hand and seal of the superintendent of the department north-west of the Ohio, or such other person as the President of the United States shall authorise to grant such licenses; to the end, that the said Indians may not be imposed on in their trade. And if any licensed trader shall abuse his privilege by unfair dealing, upon complaint and proof thereof, his license shall be taken from him, and he shall be further punished according to the laws of the United States. And if any person shall intrude himself as a trader, without such license, the said Indians shall take and bring him before the superintendent or his deputy, to be dealt with according to law. And to prevent impositions by forged licenses, the said Indians shall at least once a year give information to the superintendent, or his deputies, of the names of the traders residing among them.

ARTICLE IX.

Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States, and the said Indian tribes agree, that for injuries done by individuals on either side, [53] no private revenge or retaliation shall take place; but instead thereof, complaint shall be made by the party injured, to the other: By the said Indian tribes, or any of them, to the President of the United States, or the superintendant by him appointed; and by the superintendant or other person appointed by the President, to the principal chiefs of the said Indian tribes, or of the tribe to which the offender belongs; and such prudent measures shall then be pursued as shall be necessary to preserve the said peace and friendship unbroken, until the Legislature (or Great Council) of the United States, shall make other equitable provision in the case, to the satisfaction of both parties. Should any Indian tribes meditate a war against the United States or either of them, and the same shall come to the knowledge or the before-mentioned tribes, or either of them, they do hereby engage to give immediate notice thereof to the general or officer commanding the troops of the United States, at the nearest post. And should any tribe, with hostile intentions against the United States, or either of them, attempt to pass through their country, they will endeavor to prevent the same, and in like manner give information of such attempt, to the general or officer commanding, as soon as possible, that all causes of mistrust and suspicion may be avoided between them and the United States. In like manner the United States shall give notice to the said Indian tribes of any harm that may be meditated against them, or either of them, that shall come to their knowledge; and do all in their power to hinder and prevent the same, that the friendship between them may be uninterrupted.

ARTICLE X.

All other treaties heretofore made between the United States and the said Indian tribes, or any of them, since the treaty of 1783, between the United States and Great Britain, that come within the purview of this treaty, shall henceforth cease and become void.

[7 Stat. 49, 53]

In Testimony whereof, the said Anthony Wayne, and the Sachems and War-Chiefs of the before-mentioned Nations and Tribes of Indians, have hereunto set their Hands, and affixed their Seals. Done at Greeneville, in the Territory of the United States, north-west of the river Ohio, on the third Day of August, one thousand and seven hundred and ninety-five.

ANTHONY WAYNE.

Joseph 40-A
Wyandots.
Tar-he, (or Crane)
J. Williams, jun.
Tey-yagh-taw,
Ha-ro-en-you,
(or half King's Son)
Te-haaw-to-rens,
Aw-me-yee-ray,
Staye-tah,
Daugh-shut-tay-ah,
Sha-aw-run-the,
Sha-tey-ya-ron-yah,
(or Leather Lips)

Delawares.

Teta-boksh-ke,
(or Grand Glaize King)
Le-man-tan-quis,
(or Black King)
Wa-bat-thoe,
Magh-pi-way,
(or Red Feather)
Kik-tha-we-nund,
(or Anderson)
Bu-kon-ge-he-las,
Pee-kee-lund,
Welle-baw-kee-lund,
Pee-kee-tele-mund,
(or Thomas Adams)
Kish-ko-pe-kund,
(or Captain Buffaloe)
Ame-na-he-han,
(or Captain Crow)
Que-Shawk-say,
(or George Washington)
Wey Win-quis,
(or Billy Siscomb)
Moses,

Shawanoes.

Mis-qua-coo-na-caw,
(or Red Pole)
Cut-the-we-ka-saw,
(or Black Hoof)
Kay-se-wa-e-se-kah,

Wey-tha-pa-mat-tha,
Nia-nym-se-ka,
Way-the-ah,
(or Long Shanks)
Wey-a-pier-sen-waw,
(or Blue Jacket)
Ne-que, taugh-aw,
Hah-goo-see-kaw,
(or Captain Reed)

Ottawas.

Au-goosh-away,
Kee-no-sha-meek,
La Malice,
Ma-chi-we-tah,
Tho-wo-na-wa
Se-caw,

[54] *Chippewas.*

Mash-i-pi-nash-i-wish,
(or Bad Bird)
Nah-sho-ga-she,
(from Lake Superior)
Ka-tha-wa-sung,
Ma-sass,
Ne-me-kass,
(or Little Thunder)
Pe-shaw-kay,
(or Young Ox)
Nan-guey,
Mee-ne-doh-gee-sogh,
Pee-wan-she-me-nogh,
Wey-me-gwas,
Gob-mo-a-tick,

Ottawa.

Che-go-nickska,
(an Ottawa from
Sandusky)

Putawatames of the River Saint Joseph.

Thu-pe-ne-bu,
Naw-ac,
(for himself and brother
A-si-me-the)
Ne-nan-se-ka,
Kee-sass,
(or Sun)
Ka-ba-ma-saw,
(for himself and brother
Chi-sau-gan)
Sug-ga-nunk,
Wap-me-me,
(or White Pigeon)
Wa-che-ness,
(for himself and brother
Pe-da-go-shok)
Wab-shi-caw-naw,
La Chasse,
Me-she-ge-the-nogh,
(for himself and brother
Wa-wa-sek)
Hin-go-swash,
A-ne-wa-saw,
Naw-budgh,
Mis-se-no-go-maw,
Wa-we-eg-she,
Thaw-me,
(or le Blanc)
Gee-que,
(for himself and brother
She-win-se)

Putawatames of Huron.

O-ki-a,
Cha-mung,
Se-ga-ge-wan,
Na-naw-me,
(for himself and brother
Amgin)
Mar-chand,
We-na-me-ac,

Miamis.

Na-goh-quan-gogh,
(or le Gris)
Me-she-kin-nogh-quoh,
(or Little Turtle)

Miamis and Eel-River.

Pee-jee-wa,
(or Richard Ville)
Coch-ke-pogh-togh,

Eel-River Tribe.

Sha-me-kin-ne-sa,
(or Soldier)

Miamis.

Wa-pa-man-gwa,
(or the White Loon)

Weea's, for themselves and the Piankashaws.

A-ma-cun-sa,
(or Little Beaver)
A-coo-la-tha,
(or Little Fox)
Francis,

Kickapoos and Kaskaskias.

Kee-aw-hah,
Ne-migh-ka,
(or Josey Renard)
Pai-kee-ka-nogh,

Delawares of Sandusky.

Haw-kin-pum-is-ka,
Pey-a-mawk-say,
Reyn-tue-co-
(of the Six Nations,
living at Sandusky)

In presence of, (the word "goods" in the 6th line of the 3d article; the word "before" in the 26th line of the 3d article; the words "five hundred" in the 10th line of the 4th article; and the word "Piankashaw" in the 14th line of the 4th article, being first interlined.)

H. DeButts, first A. D. C. and Sec'y to M. G. Wayne, Wm. H. Harrison, Aid-de-camp to M. G. Wayne, T. Lewis, Aid-de-camp to M. G. Wayne. James O'Hara, Quarter-Master Genl. John Mills, Major of Infantry, and Adj. Genl. Caleb Swan, P. M. T. U. S. Geo. Demter, Lieut. Artillery. Vigo. P. fri La Fontaine, Ant. Lasselle. H. Laselle. Jn. Beau Bien. David Jones, Chaplain U.S. L. Lewis Beufait. R. Lachambre Jas. Pepon, Baties Coutien, P. Navarre.

Sworn Interpreters.

Wm. Wells, Jacques Lasselle, M. Morins, Bt. Sans Crainte, Christopher Miller, Robert Wilson, Abraham x Williams, Isaac x Zane.

To the Indian names are subjoined a mark and seal.

Now know Ye, that I having seen and considered the said Treaty, do by and with the advice and consent of the Senate of the United States, Accept, Ratify, and Confirm the same, and every article and clause thereof. In Testimony whereof, I have caused the Seal of the United States to be hereunto affixed and signed the same with my hand.

Given at the City of Philadelphia the Twenty second day of December, in the year of our Lord one [Seal] thousand seven hundred and ninety five, and in the Twentieth year of the Sovereignty and Independence of the United States.

G. Washington.

By the President:
Timothy Pickering.

APPENDIX D

TREATY OF CANANDAIGUA (Kon-on-daigua), 7 Stat. 44, November 11, 1794 BETWEEN THE SIX NATIONS AND THE UNITED STATES

GEORGE WASHINGTON

To All To Whom These Presents Shall Come, Greeting:
President of the United States of America

"Whereas a Treaty of Peace and Friendship between the United States of America and the Tribes of Indians called the Six Nations, was made and concluded on the Eleventh day of November last by Timothy Pickering the Agent of the United States for that purpose appointed, on the one part and the Chiefs and Warriors of the Six Nations on the other part which Treaty is in the form and words following:

[44] A TREATY

Between the United States of America, and the Tribes of Indians called the Six Nations.

The President of the United States having determined to hold a conference with the Six Nations of Indians, for the purpose of removing from their minds all causes of complaint, and establishing a firm and permanent friendship with them; and Timothy Pickering being appointed sole agent for that purpose; and the agent having met and conferred with the Sachems, Chiefs and Warriors of the Six Nations, in a general council. Now, in order to accomplish the good design of this conference, the parties have agreed on the following articles; which, when ratified by the President, with the advice and consent of the Senate of the United States, shall be binding on them and the Six Nations.

ARTICLE I.

Peace and friendship are hereby firmly established, and shall be perpetual, between the United States and the Six Nations.

[45] ARTICLE II.

The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New-York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

ARTICLE III.

The land of the Seneka nation is bounded as follows: Beginning on Lake Ontario, at the north-west corner of the land they sold to Oliver Phelps, the line runs westerly along the lake, as far as O-yong-wong-yeh Creek, at Johnson's Landing-place, about four miles eastward from the fort of Niagara; then southerly up that creek to its main fork, then straight to the main fork of Stedman's creek, which empties into the river Niagara, above for Schlosser, and then onward, from that fork, continuing the same straight course, to that river; (this line, from the mouth of O-yong-wong-yeh Creek to the river Niagara, above fort Schlosser, being the eastern boundary of a strip of land, extending from the same line to Niagara river, which the Seneka nation ceded to the King of Great-Britain, at a treaty held about thirty years ago, with Sir William Johnson;) then the line runs along the river Niagara to Lake Erie; then along Lake Erie to the north-east corner of a triangular piece of land which the United States conveyed to the state of Pennsylvania, as by the President's patent, dated the third day of March, 1792; then due south

to the northern boundary of that state; then due east to the south-west corner of the land sold by the Seneka nation to Oliver Phelps; and then north and northerly, along Phelps's line, to the place of beginning on Lake Ontario. Now, the United States acknowledge all the land within the aforementioned boundaries, to be the property of the Seneka nation; and the United States will never claim the same, nor disturb the Seneka nation, nor any of the Six Nations, or of their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: but it shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

ARTICLE IV.

The United States having thus described and acknowledge what lands belong to the Oneidas, Onongdagas, Cayugas and Senekas, and engaged never to claim the same, nor to disturb them, or any of the Six Nations, or their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: Now, the Six Nations, and each of them, hereby engage that they will never claim any other lands within the boundaries of the United States; nor ever disturb the people of the United States in the free use and enjoyment thereof.

ARTICLE V.

The Seneka nation, all others of the Six Nations concurring, cede to the United States the right of making a waggon road from Fort Schlosser to Lake Erie, as far south as Buffaloe Creek; and the people of the United States shall have the free and undisturbed use of this road, for the purposes of travelling and transportation. And the Six Nations, and each of them, will forever allow to the people of the United States, a free passage through their lands, and the free use of the harbours and rivers adjoining and within their respective tracts of land, [46] for the passing and securing of vessels and boats, and liberty to land their cargoes where necessary for their safety.

Article VI.

In consideration of the peace and friendship hereby established, and of the engagements entered into by the Six Nations; and because the United States desire, with humanity and kindness, to contribute to their confortable support; and to render the peace and friendship hereby established, strong and perpetual; the United States now deliver to the Six Nations, and the Indians of the other nations residing among and united with them, a quantity of goods of the value of ten thousand dollars. And for the same considerations, and with a view to promote the future welfare of the Six Nations, and of their Indian friends aforesaid, the United States will add the sum of three thousand dollars to the one thousand five hundred dollars, heretofore allowed them by an article ratified by the President, on the twenty-third day of April, 1792; making in the whole, four thousand five hundred dollars; which shall be expended yearly forever, in purchasing clothing, domestic animals, implements of husbandry, and other utensils suited to their circumstances, and in compensating useful artificers, who shall reside with or near them, and be employed for their benefit. The immediate application of the whole annual allowance now stipulated, to be made by the superintendant appointed by the President for the affairs of the Six Nations, and their Indian friends aforesaid.

Article VII.

Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and Six Nations agree, that for injuries done by individuals on either side, no private revenge or retaliation shall take place; but, instead thereof, complaint shall be made by the party injured, to the other: By the Six Nations or any of them, to the President

of the United States, or the Superintendant by him appointed: and by the Superintendant, or other person appointed by the President, to the principal chiefs of the Six Nations, or of the nation to which the offender belongs: and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken; until the legislature (or great council) of the United States shall make other equitable provision for the purpose.

NOTE. It is clearly understood by the parties to this treaty, that the annuity stipulated in the sixth article, is to be applied to the benefit of such of the Six Nations and of their Indian friends united with them as aforesaid, as do or shall reside within the boundaries of the United States: For the United States do not interfere with nations, tribes or families, of Indians elsewhere resident.

In Witness whereof, the said Timothy Pickering, and the Sachems and War-chiefs of the said Six Nations, have hereto set their hands a seals.

Done at Kon-on-daigua, in the state of New York, the eleventh day of November, in the Year one thousand seven hundred and ninety-four.

Timothy Pickering.

O-no-ye-ah-nee,
Kon-ne-at-or-lee-ooh, or Handsome Lake.
Te-kenh-you-hau, alia Capt. Key.
O-nes-hau-ee,
Ko-nooh-qung,
Tos-song-gau-lo-lus,
John Sken-en-do-a,
O-ne-at-or-lee-ooh,
Kus-sau-wa-tau,
E-yoo-ten-yoo-tau-ook,
Kohn-you-au-gong, alias Jake Stroud,
Sha-gui-e-sa,
Teer-oos, alias Capt. Prantup,
Soos-ha-oo-wau,

Henry Young Brant,
Sonh-yoo-wau-na, or Big Sky,
O-na-ah-hah,
Hot-osh-a-henh,
Kau-kon-da-nai-ya,
Non-di-yau-ka,
Kos-sish-to-wau,
Oo-jau-geht-a, or Fish Carrier.
To-he-ong-go,
Oot-a-guas-so,
Joo-non-dau-wa-onh,
Ki-yau-ha-onh,
Oo-tau-je-au-genh, or Broken Ax,
Tau-ho-on-dos, or Open the Way.
Hendrick Aupaumut,
David Neesoonhuk,
Kanatsoy, alias Nicholas Kusik,
Soh-hon-te-o-quent,
Oo-duht-sa-it,
Ken-jau-au-gus, or Stinking Fish,
Soo-noh-quau-kau,
Twen-ni-ya-na,
Jish-kaa-ga, or Green Grass hopper, alias little Billy,
Tug-gan-shot-ta,
Teh-oug-you-wush,
Teh-ong-ya-gau-na,
Kon-ne-yoo-we-sot,
Ti-ooh-quot-ta-kau-na, or Woods on Fire.
Ta-oun-dau-deesh,
Ho-na-ya-wus, alias Farmer's Brother.
Sog-goo-ya-waunt-hau, alias Red Jacket.
Kon-yoo-ti-a-yoo,
Sauh-ta-ka-ong-yees, (or Two Skies of a length.)
Oun-na-shatta-kau,
Ka-ung-ya-neh-quee,
Soo-a-yoo-wau,
Kau-je-a-ga-onh, or Heap of Dogs,
Soo-nooh-shoo-wau
Twau-ke-wash-a,
Se-qui-dong-quee, alias Little Beard.

Kod-je-ote, or Half Town.
T-ha-oo-wau-ni-as,
Soo-nong-joo-wau,
Kiant-whau-ka, alias Corn Planter.
Kau-neh-shong-goo.

Witnesses:—Israel Chapin, James Smedley, Augustus Porter, Wm. Ewing, Wm. Shephard, jun. John Wickham, James K. Garnsey, Israel Chapin, jun. Interpreters, Horatia Jones, Joseph Smith, Jasper Parish, Henry Abeele.

To the Indian names are subjoined a mark and seal.

Now know Ye, that I having seen and considered the said Treaty, do by and with the advice and consent of the Senate of the United States accept ratify and confirm the same, and have caused the Seal of the United States to be hereunto affired, and signed the same with my hand.

Given in the City of Philadelphia, the twenty first day of January, in the year of our Lord one thousand seven hundred and ninety five, and in the Nineteenth year of the Sovereignty and Independence of the United States.

Seal

G. Washington

By the President:
Edm. Randolph

APPENDIX E

Treaty of Fort Wayne, 7 Stat. 74, June 7, 1803

TREATY WITH THE DELAWARES, ETC., 1803

Articles of a treaty between the United States of America, and the Delawares, Shawanoes Putawatimies, Miamies, Eel River, Weeas, Kickapoos, Piankashaws, and Kaskaskias nations of Indians.

ARTICLES of a treaty made at Fort Wayne on the Miami of the Lake, between William Henry Harrison, governor of the Indiana territory, superintendent of Indian affairs and commissioner plenipotentiary of the United States for concluding any treaty or treaties which may be found necessary with any of the Indian tribes north west of the Ohio, of the one part, and the tribes of Indians called the Delawares, Shawanoes, Putawatimies, Miamies and Kickapoos, by their chiefs and head warriors, and those of the Eel river, Weeas, Pinkashaws and Kaskaskias by their agents and representatives Tuthinipee, Winnemac, Richerville and Little Turtle (who are properly authorized by the said tribes) of the other part.

ARTICLE I

WHEREAS it is declared by the fourth article of the treaty of Greenville, that the United States reserve for their use the post of St. Vincinnes and all the lands adjacent to which the Indian titles had been extinguished: AND WHEREAS, it has been found difficult to determine the precise limits of the said tract as held by the French and British governments: it is hereby agreed, that the boundaries of the said tract shall be as follow: Beginning at Point Coupee on the Wabash, and running thence by a line north seventy-eight degrees, west twelve miles, thence by a line parallel to the general course of the Wabash, until it shall be intersected by a line at right angles to the same, passing through the mouth of White river, thence by the last mentioned line across the Wabash and towards the Ohio, seventy-two miles, thence by a line north twelve degrees west, until it shall be intersected by a line at right angles to the same, passing through Point Coupee, and by the last mentioned line to the place of beginning.

ARTICLE II

The United States hereby relinquish all claim which they may have had to any lands adjoining to or in the neighborhood of the tract above described.

ARTICLE III

As a mark of their regard and attachment to the United States, whom they acknowledge for their only friends and protectors, and for the consideration herein after mentioned, the said tribes do hereby relinquish and cede to the United States the great salt spring upon the Saline creek which falls into the Ohio below the mouth of the Wabash, with a quantity of land surrounding it, not exceeding four miles square, and which may be laid off in a square or oblong as the one or the other may be found most convenient to the United States: And the said United States being desirous that the Indian tribes should participate in the benefits to be derived from the said spring, hereby engage to deliver yearly and every year for the use of the said Indians, a quantity of salt not exceeding one hundred and fifty bushels, and which shall be divided among the several tribes in such manner as the general council of the chiefs may determine.

ARTICLE IV

For the considerations before mentioned and for the convenience which the said tribes will themselves derive from such establishments it is hereby agreed that as soon as the tribes called the Kickapoos, Eel River, Weeas, Piankashaws and Kaskaskias shall give their consent to the measure, the United States shall have the right of locating three tracts of lands (of such size as may be agreed upon with the last mentioned tribes) on the main road between Vincennes and Kaskaskias, and one other between Vincennes and Clarksville for the purpose of erecting houses of entertainment for the accommodation of travellers. But it is expressly understood that if the said locations are made on any of the rivers, which cross the said road, and ferries should be established on the same, that in times of high water any Indian or Indians belonging to either of the tribes who are parties to this treaty shall have the privilege of crossing such ferry toll free.

Article V

WHEREAS there is reason to believe that if the boundary lines of the tract described in the first article should be run in the manner therein directed, that some of the settlements and locations of land made by the of the settlements and locations of land made by the citizens of the United States will fall in the Indian country—It is hereby agreed that such alterations shall be made in the direction of these lines as will include them; and a quantity of land equal in quantity to what may be thus taken shall be given to the said tribes either at the east or the west end of the tract.

IN TESTIMONY WHEREOF, the commissioner of the United States, and the chiefs and warriors of the Delawares, Shawanees, Pattawatimas, Miamis, and Kickapoos, and those of the Eel River, Weas, Piankeshaws, and Kaskaskias, by their agents and representatives Tuthinipee, Winnemac, Richewille, and the Little Turtle, who are properly authorized, by the said tribes, have hereunto subscribed their names and affixed their seals, at Fort Wayne, this seventh day of June, in the year of our Lord one thousand eight hundred and three, and of the independence of the United States the twenty-seventh.

William Henry Harrison, (L.S.)

Miamis:
Richewille, his X mark,
Meseekunnoghquoh, or Little Turtle, his X mark,
On behalf of themselves, Eel Rivers, Weas, Piankeshaws and Kaskaskias, whom they represent.
Kickapoos:
Nehmehtohah, or standing, his X mark,
Pashsheweha, or cat, his X mark,
Shawanees:
Neahmemsiech, his X mark,
Pattawatimas:
Tuthinipee, his X mark,
Winnemac, his X mark,
On behalf of the Pattawatimas, and Eel Rivers, Weas, Piankeshaws, and Kaskaskias, whom they represent.
Wannangsea, or five medals, his X mark,
Keesas, or sun, his X mark,
Delawares:
Teta Buxike, his X mark,
Bukongehelas, his X mark,
Hockingpomskenn, his X mark,
Kechkawhanund, his X mark,
Shawanees:
Cuthewekasaw, or Black Hoof, his X mark
Methawnasice, his X mark,
Signed, sealed, and delivered in the presence of—
J. R. Jones, secretary to commission
John Gibson, secretary Indian Territory,
Tho. Pasteur, captain, First Regiment Infantry
William Wells, interpreter,
John Johnson, United States factor
H. Aupaumut, chief of Muhhecon,
Thomas Freeman.

The proceedings at the within treaty were faithfully interpreted by us, John Gibson and William Wells; that is, for the Delawares, John Gibson, and for the rest of the tribes, William Wells.

John Gibson
William Wells

APPENDIX F

EXCERPTS FROM THE INDIAN CLAIMS COMMISSION ACT

60 Stat. 1049 et seq., 25 U.S.C. § 70 et seq.

§ 1 (25 U.S.C. § 70) Creation of Commission
§ 2 (25 U.S.C. § 70a) Jurisdiction; claims considered; Offsets and counterclaims
§ 3 [as amended] (25 U.S.C. § 70b) Members of Commission-Appointment Qualifications-Oath
§ 12 (25 U.S.C. § 70k) Limitation of Time for presenting claim
§ 19 (25 U.S.C. § 70r) Final Determination of Commission
§ 20 (25 U.S.C. § 70s) Review by Court of Claims and Supreme Court

§ 70. Creation of Commission

There is created and established an Indian Claims Commission, referred to in this chapter as the Commission. Aug. 13, 1946, c. 959, § 1, 60 Stat. 1049.

§ 70a. Jurisdiction; claims considered; offsets and counterclaims

The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of

fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after August 13, 1946, shall be considered by the Commission.

All claims under this chapter may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.

In determining the quantum of relief the Commission shall make appropriate deductions for all payments made by the United States on the claim, and for all other offsets, counterclaims, and demands that would be allowable in a suit brought in the Court of Claims under section 250 of Title 28; the Commission may also inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant, except that it is declared to be the policy of Congress that monies spent for the removal of the claimant from one place to another at the request of the United States, or for agency or other administrative, educational, health or highway purposes, or for expenditures made prior to the date of the law, treaty or Executive Order under which the claim arose, or for expenditures made pursuant to sections 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478 and 479 of this title, save expenditures made under section 465 of this title, or for expenditures under any emergency appropriation or allotment made subsequent to March 4, 1933, and generally applicable throughout the United States for relief in stricken agricultural areas, relief from distress caused by unemployment and conditions resulting therefrom, the prosecution of public work and public projects for the relief of unemployment or to increase employment, and for work relief (including the Civil Works Program) shall not be a proper offset against any award. Aug. 13, 1946, c. 959, § 2, 60 Stat. 1050.

§ 70b. Members of Commission—Appointment; qualifications; oath

(a) The Commission shall consist of five Commissioners who shall be appointed by the President, by and with the advice and consent of the Senate. The President shall designate one Commissioner as Chairman. At all times at least three Commissioners shall be members of the bar of the Supreme Court of the United States in good standing. No more than three Commissioners shall be of the same political party. Each Commissioner shall take an oath to support the Constitution of the United States and to discharge faithfully the duties of his office.

The persons holding the offices of Chief Commissioner and Associate Commissioner of the Indian Claims Commission on April 9, 1967, shall continue in office serving as Commissioners of the Indian Claims Commission until June 30, 1968, unless prior to that date the President shall appoint them pursuant to this section.

(b) The Commissioners shall hold office during their good behavior until the dissolution of the Commission as provided in this chapter. Vacancies shall be filled in the same manner as the original appointments. Members of the Commission may be removed by the President for cause after notice and opportunity to be heard.

(c) No Commissioner shall engage in any other business, vocation, or employment during his term of office nor shall he, during his term of office or for a period of two years thereafter, represent any Indian tribe, band, or group in any matter whatsoever, or have any financial interest in the outcome of any tribal claim. Any person violating the provisions of this subsection shall be fined not more than $10,000 or imprisoned not more than two years, or both.

Quorum

(d) Three Commissioners shall constitute a quorum, and the agreement of three Commissioners shall be necessary to any and all determinations for the transaction of the business of the Commission, and, if there be a quorum, no vacancy shall impair or affect the business of the Commission, or its determinations.

§ 70k. Limitation of time for presenting claims

The Commission shall receive claims for a period of five years after August 13, 1946, and no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress. Aug. 13, 1946, c. 959, § 12, 60 Stat. 1052.

§ 70r. Final determinations of Commission

The final determination of the Commission shall be in writing, shall be filed with its clerk, and shall include (1) its findings of the facts upon which its conclusions are based; (2) a statement (a) whether there are any just grounds for relief of the claimant and, if so, the amount thereof; (b) whether there are any allowable offsets, counterclaims, or other deductions, and, if so, the amount thereof; and (3) a statement of its reasons for its findings and conclusions. Aug. 13, 1946, c. 959, § 19, 60 Stat. 1054.

§ 70s. Review by Court of Claims and Supreme Court

(a) In considering any claim the Commission at any time may certify to the Court of Claims any definite and distinct questions of law concerning which instructions are desired for the proper disposition of the claim; and thereupon the Court of Claims may give appropriate instructions on the questions certified and transmit the same to the Commission for its guidance in the further consideration of the claim.

(b) When the final determination of the Commission has been filed with the clerk of said Commission the clerk shall give notice of the filing of such determination to the parties to the preceeding in manner and form as directed by the Commission. At any time within three months from the date of the filing of the determination of the Commission with the clerk either party may appeal from the determination of the Commission to the Court of Claims, which Court shall have exclusive jurisdiction to affirm, modify, or set aside such final determination. In similar manner and with like effect either party may appeal to the Court of Claims from any interlocutory determination by the Commission establishing the liability of the United States notwithstanding such determination is not for any reason whatever final as to the amount of recovery; and any such interlocutory appeal shall be taken on or before January 1, 1961, or three months from such interlocutory determination, whichever is later: *Provided*, That the failure of either party to appeal from any such interlocutory determination shall not constitute a waiver of its right to challenge such interlocutory determination in any appeal from any final determination subsequently made in the case. On said appeal the Court shall determine whether the findings of fact of the Commission are supported by substantial evidence, in which event they shall be conclusive, and also whether the conclusions of law, including any conclusions respecting "fair and honorable dealings", where applicable, stated by the Commission as a basis for its final determination, are valid

and supported by the Commission's findings of fact. In making the foregoing determinations, the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. The Court may at any time remand the cause to the Commission for such further proceedings as it may direct, not inconsistent with the foregoing provisions of this section. The Court shall promulgate such rules of practice as it may find necessary to carry out the foregoing provisions of this section.

(c) Determinations of questions of law by the Court of Claims under this section shall be subject to review by the Supreme Court of the United States in the manner prescribed by section 288 of Title 28. Aug. 13, 1946, c. 959, § 20, 60 Stat. 1054; Sept. 8, 1960, Pub. L. 86-722, 74 Stat. 829.

Supreme Court, U. S.
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No. 75-389

In the Supreme Court of the United States

OCTOBER TERM, 1975

JAMES STRONG, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-389

JAMES STRONG, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the Indian Claims Commission and the Court of Claims erred in denying their claims based on non-exclusive occupancy of land. Petitioners also contend that the Commission and the Court of Claims erred in their interpretation of portions of two treaties concerning the Post of St. Vincennes tract reserved by the United States.

By the Treaty of Greeneville of August 3, 1795, 7 Stat. 49 (Pet. App. C, 108a-120a), 15 groups of Indians ceded to the United States approximately 20 million acres of land, in Ohio, Indiana, Illinois and Michigan (see Treaty of Greeneville, Article III; Pet. App. C, 109a-112a). In return, the United States, among other things, agreed to relinquish its claims within a large described area except for the Post of St. Vincennes on the Wabash River and other listed tracts (Treaty of Greeneville Article IV; Pet. App. C, 112a-113a). Under Section 2 of the Indian Claims Commission Act, 60 Stat. 1050, 25 U.S.C.

70a, eighteen present day tribes brought claims before the Indian Claims Commission asserting that their ancestors had aboriginal or recognized title at the date of the Treaty to portions of the land ceded by the Treaty and that they received inadequate compensation for the lands given up.[1]

Before reaching the question of adequacy of compensation, the Commission held (Pet. App. B, 14a-18a) that the ancestors of the petitioner tribes did not have recognized title to the lands in question before the Treaty of Greeneville and that the Treaty did not recognize such title. The question then became whether, and to what extent, the various tribes had aboriginal title to the land in question, that is, whether they possessed it sufficiently to give rise to a claim under the Act.

The Commission, after extensive findings of fact (Pet. App. B, 43a-107a), distinguished between areas where no tribe had permanent settlements or control for any extensive period of time, and areas that were under the exclusive control of a particular tribe.[2] As to the latter, it recognized aboriginal title giving rise to a claim under the Act, but as to the former it denied the claims. There were substantial areas within each category (see Pet. App. B, 39a-42a).

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[1] Twelve of these tribes have joined in the present petition. Another tribe has petitioned separately: *Pottawatomie Tribe of Indians, et al.* v. *United States*, No. 75-438; and two other tribes have joined in a third petition, *Hannahville Indian Community, et al.* v. *United States*, No. 75-458.

[2] The Commission rejected on factual grounds the contention that a confederation of tribes controlled certain areas (Pet. App. B, 18a-21a).

The Commission also held (Pet. App. B, 37a-38a) that the tribes, by the Treaty of Greeneville, agreed to the reservation by the United States of the Vincennes tract and that the later delineation of boundaries by the Treaty of Fort Wayne of June 7, 1803 (7 Stat. 74; Pet. App. E, 128a-131a) did not give rise to a claim under the Act. The Commission also found that "no tribes possessed aboriginal title to the Vincennes Tract at the time of the 1795 Greeneville Treaty." Finding 32, Pet. App. B, 98a.

On interlocutory appeals, the Court of Claims affirmed the holdings of the Commission (Pet. App. A, 1-26), with the sole exception of its finding of Indian possession of certain "old Wea towns," as to which it remanded the case to the Commission for further findings (Pet. App. A, 22). Since the question of compensation had not been reached by the Commission, the court also remanded the case to the Commission for further proceedings on that issue in regard to the land as to which aboriginal title had been recognized (Pet. App. A, 26).

1. The decision of the Court of Claims is correct and presents no issue warranting review by this Court. Petitioners contend (Pet. 9-13) that the Commission and the court below improperly denied their claims to possession of areas that were not possessed exclusively by a single tribe. The decisions below, however, carefully applied existing law, including recognition of possible joint occupancy, to the facts of the case.

The Court of Claims stated the requirements to prove aboriginal title as follows (Pet. App. A, 4):

> "[t]o be accepted under the Indian Claims Commission Act, aboriginal title must rest on *actual, exclusive and continuous use and occupancy 'for a long time' prior to loss of the property.* [Emphasis supplied.]"

This recognized test of aboriginal title has been consistently used and approved both before and after the enactment of the Claims Commission Act.[3] The court pointed out, however, that two or more tribes could have joint aboriginal title if they shared land through a "joint and amical" "close" relationship (Pet. App. A, 6-7), but, applying this test, the court affirmed the Commission's finding that that degree of relationship did not exist here.

Moreover, another element of the rule—that the occupancy must be for a long time—also defeats petitioners' claims. The rule as stated by this Court is that the right must be based on "immemorial occupancy"[4] or "aboriginal possession."[5] In either event, the undisputed findings of the Commission are that the area in question was vacant from the latter part of the 17th century until 1730, when ancestors of petitioners first started to move into it. However, by the 1780's they had abandoned it again, albeit in part under military pressure (Pet. App. B, 51a-70a).

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[3] *Northwestern Bands of Shoshone Indians* v. *United States,* 324 U.S. 335, 338-339; *United States* v. *Santa Fe Pacific R. Co.,* 314 U.S. 339, 345; *Buttz* v. *Northern Pacific R.R.,* 119 U.S. 55, 69-70; *Worcester* v. *Georgia,* 6 Pet. 515, 559; *Johnson and Graham's Lessee* v. *McIntosh,* 8 Wheat. 543; *Confederated Tribes of Warm Springs Reservation* v. *United States,* 177 Ct. Cl. 184, 194; *Red Lake, Pembina and White Earth Bands* v. *United States,* 164 Ct. Cl. 389, 393; *Spokane Tribe* v. *United States,* 163 Ct. Cl. 58, 66; *Sac and Fox Tribe* v. *United States,* 315 F.2d 896, 902-903 (Ct. Cl.), certiorari denied, 375 U.S. 921; *Quapaw Tribe* v. *United States,* 120 F. Supp. 283, 286 (Ct. Cl.); *Snake or Piute Indians* v. *United States,* 112 F. Supp. 543, 551-552 (Ct. Cl.).

[4] *Northwestern Bands of Shoshone Indians* v. *United States, supra,* 324 U.S. at 338.

[5] *United States* v. *Santa Fe Pacific R. Co., supra,* 314 U.S. at 345.

2. The issues presented by the case are not of continuing importance. Aboriginal title is not an interest in land protected by the Fifth Amendment[6] and is compensable only because Congress, through the Indian Claims Commission Act, has provided compensation for loss of interests beyond those ordinarily recognized by law. See 25 U.S.C. 70a. All claims under the Indian Claims Commission Act, however, had to be filed before August 14, 1951.[7] Litigation under the Act is drawing to a close after almost 30 years, during which Indian title to approximately 1 billion acres has been tried. Indeed, the Commission, under present law, is due to expire on April 10, 1977.[8] The bulk of the litigation under the Indian Claims Commission Act has thus already been decided under the rules applied here by the Commission and the Court of Claims. If the definition of aboriginal title were now substantially broadened in regard to joint occupancy few, if any, pending cases would be affected.

3. Petitioners' second contention (Pet. 8) concerns the extent of the area of land reserved by the United States around the Post of St. Vincennes. The Treaty of Greeneville provides in Article IV (Pet. App. C, 112a-113a) that in relinquishing its claim to various areas, the United States expressly reserved "[t]he post of St. Vincennes on the river Wabash, and the lands adjacent, of which the Indian title has been extinguished." A dispute subsequently arose over the area intended to be covered by the Vincennes reservation

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[6] *Tee-Hit-Ton Indians* v. *United States,* 348 U.S. 272, 279.

[7] Sec. 12, 60 Stat. 1052, 25 U.S.C. 70k.

[8] Act of March 30, 1972, 86 Stat. 114, 25 U.S.C. (Supp. III) 70v.

in the Treaty of Greeneville. It was resolved by the Treaty of Fort Wayne (Pet. App. E, 128a-131a), in which a metes and bounds description was given. The area thus described contained 1,800,000 acres. The Commission found (Finding 32, Pet. App. B, 98a):

> The evidence herein indicates that the Indians at Greeneville in 1795 did not contest the prior extinguishment of their claims to the area around Vincennes. Furthermore, although the evidence indicates that in the proceeding leading up to the 1803 Fort Wayne Treaty the Indians did at first protest the extent of the prior extinguishment (which protest Governor Harrison after investigation agreed with), the Indians did ultimately agree that the area described in the first article of the Fort Wayne Treaty was the area which would be considered equivalent to that area described in the 1795 Greeneville Treaty.

The Court of Claims correctly affirmed this finding, pointing out that it is a common practice to rely upon a later treaty to define an indefinite cession in an earlier treaty (Pet. App. A, 16).

The issue presented on the Vincennes tract, moreover, is a narrow question of treaty interpretation affecting no claims other than those of two of the petitioners herein.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

Robert H. Bork,
Solicitor General.

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IN THE

Supreme Court of the United States

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THE UNITED STATES OF AMERICA, *Respondent*.

On Petition for Writ of Certiorari to the United States Court of Claims

PETITIONERS' REPLY TO MEMORANDUM IN OPPOSITION

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JAMES STRONG, ET AL., *Petitioners,*
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On Petition for Writ of Certiorari to the United States Court of Claims

PETITIONERS' REPLY TO MEMORANDUM IN OPPOSITION

The memorandum of the United States in opposition begs the questions at issue.

A.

Respondent makes certain arguments and assertions of fact not germane to the central issue, which is "exclusiveness" of possession as a criterion of aboriginal

Indian title. The assertion that there were no permanent settlements in the areas to which the claims of title were denied (Memorandum 2) is immaterial, since permanent settlements are not a requirement of aboriginal title (*Spokane Tribe* v. *United States,* 163 C. Cls. 58, 66) as well as mistaken, since the Commission's findings show permanent settlements in such areas similar to those in the "exclusive" areas, except for their mixed tribal occupancy (see Findings 9, 10, Pet. App. B, pp. 56a-64a). The contention that the claimants' use and occupancy were of too short duration (Memorandum 4) was overruled by the Commission and was not raised by the Government on its appeal from the holdings favorable to the Delaware and Shawnee tribes. The contention that the lands were abandoned (ibid.) was rejected by both the Commission and the Court of Claims.

B.

The contention that the test of Indian title recited by the Court below, (actual, "exclusive" and continuous use and occupancy) "has been consistently used and approved" (Memorandum 4) evades the issue, since what is here involved is a unique application of the doctrine of "exclusiveness". In none of the cases cited was there any question of aboriginal title claimed by two or more tribes using or occupying land together.

The cited decisions of the Court of Claims, all involving claims under the Indian Claims Commission Act, routinely recited the same aboriginal title formula, but had no occasion to test its application to a case like this one. The present decision of the same court is not a logical extension of a previously developed rule, but a new and unprecedented holding.

The Supreme Court decisions cited are all consistent with the view that two or more friendly tribes may hold aboriginal title together, to the exclusion of others, and the principles underlying the decisions support such a view. *Santa Fe* was cited and quoted in the petition (at p. 12). On the authority of *Santa Fe, Northwestern Shoshone* contains a similar dictum on aboriginal title: ". . . the right because of immemorial occupancy to roam certain territory to the exclusion of other Indians and in contradistinction to the custom of the early nomads to roam at will in search of food" (324 U.S. 335, 339). As in *Santa Fe* the contrast is drawn, not between one tribe and more than one, but between stable land use and nomadic wandering. The case turned on the question whether the title was recognized by treaty, not on the criteria for aboriginal title. A dissent on the treaty interpretation question, by Mr. Justice Douglas, author of the *Santa Fe* opinion, summarizes aboriginal title without reference to exclusiveness: "Indian title is the right to occupancy based upon aboriginal possession" and the dissent goes on to quote from *Mitchell* v. *United States* the principle that "the right of occupancy is considered as sacred as the fee simple of the whites" (324 U.S. at 359). There is no suggestion that, unlike whites, Indian tribes may not be co-owners.

Johnson v. *McIntosh* and *Worcester* v. *Georgia,* cited by respondents, are the classic statements by Chief Justice John Marshall on the political relations between the United States and its Indian tribes. The tribes "were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion" (*Johnson* v. *McIntosh,* 8 Wheat. 543, 574). There is nothing in the opinion which implies that the claim is defeated when the Indians' discretion led to shared use. The principles of these decisions strongly suggest the contrary.

C.

Respondent United States errs in describing the Vincennes tract issue as simply a question of treaty interpretation (Memorandum 5-6). It is not disputed that the treaty of Fort Wayne defined the boundaries of the Vincennes tract reserved to the United States under the Greeneville treaty. But, since the boundaries so defined erroneously encompassed more land than the United States was entitled to under the Greeneville treaty, with no payment therefor to the tribes who thus lost their rights of possession, the question is whether the agreement of the tribes to the erroneous boundaries is a valid reason for denying them compensation.

CONCLUSION

For the foregoing reasons, and the reasons stated in the petition, the petition for certiorari should be granted.

Respectfully submitted,

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